

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966 1967

No. ~~730~~ 21

OSWALD ZSCHERNIG, ET AL., APPELLANTS,

vs.

WILLIAM J. MILLER, ADMINISTRATOR, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

PETITION FOR CERTIORARI FILED OCTOBER 22, 1966

CERTIORARI GRANTED MAY 8, 1967

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 730

OSWALD ZSCHERNIG, ET AL., APPELLANTS,

vs.

WILLIAM J. MILLER, ADMINISTRATOR, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

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[fol. A]

**IN THE SUPREME COURT
OF THE STATE OF OREGON**

In the Matter of the Estate of
PAULINE SCHRADER, Deceased.

**OSWALD ZSCHERNIG, MINNA PABEL, OLGA HERTA WINCKLER,
ALFRED KOESTER, JOHANNA BLASCHKE and HANS FUESSEL,
Plaintiffs-Appellants,**

v.

**WILLIAM J. MILLER, Administrator of the Estate of Pauline
Schrader, Deceased, MARK O. HATFIELD, TOM MCCALL
and ROBERT W. STRAUB, respectively the Governor, Sec-
retary of State and State Treasurer of Oregon, consti-
tuting the STATE LAND BOARD OF OREGON, and all persons
unnamed or unknown having or claiming any interest
in the Estate of Pauline Schrader, Deceased, Defen-
dants-Respondents.**

[fol. 1]

Appellants' Abstract of Record

PLEADINGS

On November 28, 1962, the state of Oregon, acting through the State Land Board, by and through the Attorney General of Oregon, filed in the circuit court of Multnomah county, Oregon, in the matter of the Estate of Pauline Schrader, deceased, then pending for administration in the probate department of said court [Register No. 91805], its

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PETITION FOR FINDING AND ORDER OF ESCHEAT

as follows:

I

That it appears from the records and files in this estate that Pauline Schrader died intestate in Multnomah County, Oregon, on September 30, 1962, leaving an estate of real and personal property in this state of the probable value of \$20,000.

II

That your petitioner is informed and believes and therefore alleges that the decedent was survived only by certain relatives residing in East Germany, possibly a brother and sister.

III

That under the provisions of ORS 111.070 aliens not residing in the United States are not eligible to take either by testate or intestate succession property of a decedent situated in the State of Oregon without proof of the existence of the rights required under the provisions of said statute.

IV

That petitioner is informed and therefore alleges that the rights required by the provisions of ORS 111.070 do not exist with respect to East Germany.

[fol. 2]

V

That petitioner is informed and believes and therefore alleges that there are no heirs of the deceased residing elsewhere who would be eligible to take and petitioner therefore alleges that the deceased died without heirs, devisees or legatees legally entitled to inherit or take decedent's estate.

VI

That said decedent's estate situated in the State of Oregon has escheated to and become the property of the State of Oregon pursuant to the provisions of ORS 111.070 and 120.010.

Wherefore, petitioner prays for a finding, order and decree, that:

1. Pauline Schrader died on September 30, 1962, survived only by possible relatives residing in East Germany.

2. The rights required by the provisions of ORS 111.070 do not exist with respect to East Germany.

3. There are no heirs, devisees or legatees elsewhere eligible to take said decedent's estate.

4. The clear proceeds of said decedent's estate have escheated to and became the property of the State of Oregon as of the date of the death of said decedent.

5. The administrator of said estate deliver to the State Land Board of the State of Oregon for payment into the Common School Fund the clear proceeds of said decedent's estate situated in the State of Oregon.

[fol. 3]

PETITION TO DETERMINE HEIRSHIP

filed in said court on September 25, 1963, by the plaintiffs pursuant to the above mentioned Order Directing Determination of Heirship [etc.] entered on August 30, 1963, as follows:

Paragraphs I, II and III allege that Pauline Schrader died intestate on or about September 30, 1962, at Portland in Multnomah county, Oregon, of which she was at her death a resident, leaving an estate consisting of real and

personal property appraised at \$17,764.72, that on October 12, 1962, the court appointed William J. Miller as administrator of her estate, he duly qualified and was still such administrator, and that at her death the said Pauline Schrader was unmarried and left no issue.

Paragraphs IV and XI inclusive allege extensive and detailed genealogical facts and data not material to this appeal about the family of the decedent Pauline Schrader, showing her next of kin and heirs at law - [and their portions of inheritance] under the laws of descent and distribution of the state of Oregon, to be the plaintiffs herein, namely,

[fol. 4] Oswald Zschernig, brother, residing at No. 87 Merschwitz, District of Riesa, Germany,
Minna Pabel, sister, residing at 76 II Goethestrasse, Riesa, Germany,
Olga Herta Winckler, niece, residing at 3 Neue Strasse, Lommatzsch, Germany,
Alfred Koester, nephew, residing at 17 Roethische-strasse, Leipzig S 3, Germany,
Johanna Blaschke, niece, residing at 72 Leipziger Strasse, Leipzig-Borsdorf, Germany,
Hans Fuessel, nephew, residing at 5 Gartenstrasse, Leipzig-Engelsdorf, Germany,

all of said addresses being in the so-called Eastern or Soviet Occupied Zone of Germany, each of said six heirs being of legal age and competent and being each entitled to inherit one-sixth of the clear proceeds of said estate of Pauline Schrader, deceased.

Thereafter said Petition alleges as follows:

XII

That the defendants, Mark O. Hatfield, Howell Appling, Jr., and Howard C. Belton, are the Governor, Secretary of State and State Treasurer of the State of Oregon, respectively, and as such constitute the

State Land Board of Oregon, and the State Land Board is the custodian of escheated estate funds under the laws of the State of Oregon; that on or about November 28, 1962, the State of Oregon, acting through the State Land Board, by and through the Attorney General of Oregon, filed its Petition for Finding and Order of Escheat wherein it is alleged that the decedent had "relatives residing in East Germany, possibly a brother and sister", and wherein it is further alleged that reciprocal rights of inheritance as required under ORS 111.070, do not exist with East Germany, and wherein it is prayed that the administrator deliver to the State Land Board of the State of Oregon for payment into the Common School Fund, the clear proceeds of this estate as an escheat to the State of Oregon.

[fol. 5]

XIII

That each of your petitioners are and were at the date and time of death of Pauline Schrader, residents of the so-called Eastern or Soviet Occupied Zone of Germany; that the (only) legally constituted government of the country of Germany, including the territory of the so-called Eastern or Russian Zone of Occupation thereof, is that of the Federal Republic of Germany, and that all of your petitioners are therefore citizens and nationals thereof; that on October 29, 1954, there was signed at Washington, D. C., thereafter duly ratified and on July 14, 1956, there went into effect a Treaty of Friendship, Commerce and Navigation between the Governments of the United States of America and of the Federal Republic of Germany [7 UST 1839; TIAS 3593; 273 UNTS 3] Article IX, paragraph 3 of which provides as follows:

"3. Nationals and companies of either Party shall be accorded national treatment, within the territories of the other Party, with respect to acquiring

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property of all kinds by testate or intestate succession or under judicial sale to satisfy valid claims. Should they because of their alienage be ineligible to continue to own any such property, they shall be allowed a period of at least five years in which to dispose of it."

that said treaty and the said quoted Article IX, paragraph 3 thereof, was at the time and date of death of Pauline Schrader and has at all times since then been and is now in full force and effect; that by reason and virtue thereof Section 111.070, ORS, has no application to your petitioners' right to take and receive their distributive shares of the estate of Pauline Schrader inasmuch as their right to their said shares is, by reason of their being national citizens and nationals of Germany, provided for and guaranteed by said provision of said treaty.

XIV

That your petitioners are all the heirs at law of the decedent and are each entitled to have distributed to them one-sixth of the remaining assets of this estate and of the net clear proceeds of this estate; that by reason of the plaintiffs herein being in fact the heirs of the said Pauline Schrader, deceased, the State of [fol. 6] Oregon has no interest in this estate and the said Petition for Finding and Order of Escheat filed by the State Land Board should be denied.

XV

That the plaintiffs know of no other person not made a party herein who is or claims to be an heir or distributee of the estate of Pauline Schrader, deceased.

XVI

That it is meet and proper that the heirs at law and the persons entitled to distribution of the estate of this decedent be determined in accordance with the laws of descent and distribution of the State of Oregon; that the decedent left surviving her your petitioners, namely, the plaintiffs herein, and that no other person is entitled to take any part of this estate under the laws of descent and distribution of the State of Oregon. -

The prayer of the Petition asks that the Petition be set for hearing at a date and time certain; that a Citation issue and be served on the defendants, all as prescribed by the applicable statutes, the prayer concluding as follows:

And plaintiffs further pray that, upon the hearing of this petition, the Court determine who are entitled to distribution of this estate upon final settlement, adjudging and decreeing that the said plaintiffs are all the heirs at law and next of kin of the decedent and by reason thereof said plaintiffs are entitled to succeed to and have distribution made to them of all the clear proceeds of the residue of the estate, and that no other person whether named or unnamed, known or unknown, is entitled to receive any assets of this estate upon distribution.

* * * * *

[fol. 7] On December 5, 1963, the state of Oregon, through the State Land Board, filed its

ANSWER OF STATE LAND BOARD

wherein were admitted paragraphs I through III and paragraph XII of the petition, paragraphs IV through XI [containing the genealogical data about decedent's family] were denied for lack of knowledge or information, and in

respect to paragraphs XIII and XIV the answer alleged as follows:

III

In answer to paragraph XIII admits that a Treaty of Friendship, Commerce and Navigation was entered into between the governments of the United States of America and the Federal Republic of Germany and was in effect at the death of Pauline Schrader and is currently in full force and effect and denies each and every other allegation in paragraph XIII.

IV

Denies paragraph XVI.

The prayer in said answer is as follows:

[fol. 8] WHEREFORE, the defendant State Land Board of the State of Oregon prays that, upon the hearing of plaintiffs' petition, this court find, order and decree that:

1. Pauline Schrader died on September 30, 1962, survived only by possible relatives residing in East Germany.

2. The Treaty of Friendship, Commerce and Navigation between the governments of the United States of America and of the Federal Republic of Germany, referred to in paragraph XIII of plaintiffs' petition, has no application to residents of Eastern Germany.

3. The rights required by the provisions of ORS 111.070 do not exist with respect to East Germany.

4. There are no heirs, devisees or legatees elsewhere eligible to take said decedent's estate.

5. The clear proceeds of said decedent's estate have escheated to and become the property of the State of Oregon as of the date of the death of said decedent.

6. The administrator of said estate deliver to the State Land Board of the State of Oregon for payment into the Common School Fund the clear proceeds of said decedent's estate situated in the State of Oregon.

On August 18, 1964, the plaintiffs, by leave of court duly granted, filed their

REPLY

as follows:

I

In reply to paragraph III of said answer plaintiffs allege that Section 111.070, Oregon Revised Statutes, is in violation of the existing policy of the federal government of the United States of America and constitutes an unlawful and unauthorized attempt by the State of Oregon to invade the exclusive power of the Federal Government to regulate the foreign relations of the United States of America; that therefore said statute is invalid and should be given no effect by this Court.

WHEREFORE, plaintiffs having fully replied to the answer of the defendant State Land Board of Oregon, pray that they be adjudged and decreed to be all the heirs at law and next of kin of Pauline Schrader, de- [fol. 9] ceased, and that by reason thereof they are entitled to succeed and have distribution to them of all the clear proceeds of her estate pursuant to their petition on file herein.

Upon trial to the court, the filing of written briefs and oral arguments by counsel the court on April 9, 1965, rendered an

ORAL OPINION BY THE COURT

as follows:

THE COURT: Gentlemen, at the outset I want to say to you that I have enjoyed the privilege of studying

the briefs that were as well prepared and covered the subject as exhaustively as the briefs that each of you submitted.

Also, I want to say that it is not my province to express my political opinion but only my judicial opinion in determining a matter that is before me.

We are not concerned in any way with the 1923 Treaty between the United States of America and Germany. It was abrogated long before the times in which we are interested. We are concerned with the Treaty of 1954 between the United States of America and the Federal Republic of Germany which was ratified on July 14, 1956. This Court is of the opinion that both the evidence and the law show that said Treaty is restricted to the territorial limits set out in the Treaty itself and has no binding effect on either of the parties insofar as any other area is concerned. There are and have been since 1949 two separate and distinct governments controlling what used to be a unified Germany. There is, as we know, the government of the Federal Republic of Germany with which the 1954 Treaty was made, and there is the government of the German Democratic Republic that is the satellite of Communist Russia. We know that neither of those governments can impose its will on the residents and inhabitants of the territory of the other. Some day there may be a unified Germany recognized by the United States of America that will encompass all of the territory that was Germany before World War II, but that is not the case at the moment. This 1954 Treaty with which we are concerned has no application what-[fol.10] soever to the people in East Germany and they have gained no rights by it.

The contention that ORS 111.070 is in violation of the existing policy of the Government of the United States of America and constitutes an unlawful and unauthorized attempt by the State of Oregon to invade the exclusive power of the Federal Government to

regulate the foreign relations and therefore is invalid and should be given no effect by this Court is without merit in view of the decision of the United States Supreme Court in the case of *Clark v. Allen*, 331 U. S. 503, 91 L. Ed. 1633. If the rules of law announced in that case should be changed because of changed conditions in the world or for political reasons, the Congress or the Supreme Court of the United States should revise the laws, certainly not this Probate Court.

The evidence before the Court does not establish the existence of reciprocity as required by ORS 111.070 as of the date of death of Pauline Schrader on September 30, 1962.

It is the judgment of this Court that the assets of the estate escheat to the State of Oregon.

I call the attention of counsel to the fact that I will be on vacation for a month after Friday of next week. Since this case has been before this Court for so long awaiting the final brief that reached me only on April 2, 1965, I suggest that it would be well to get the order in next week.

Thank you again for your very fine preparation of the case. It is a pleasure to have lawyers be so thorough.

On April 15, 1965, the court entered its

FINDINGS AND ORDER OF ESCHEAT

as follows:

This cause came on regularly for hearing before the court on April 28, 1964, pursuant to a petition for escheat filed by the State of Oregon, by and through the State Land Board, and also a petition for determination of heirship filed by the relatives of the decedent, all of whom reside in the territory of East

Germany under the government of the German Democratic Republic.

At the April 28 hearing and in a further hearing on August 18, 1964, and also during the presentation of oral arguments on April 9, 1965, the State Land Board appeared through Robert Y. Thornton, Attorney General of Oregon, by Walter L. Barrie, Assistant Attorney General, and the relatives of the decedent appeared through their attorney Peter A. Schwabe.

The court having heard the testimony of witnesses and arguments of counsel and having considered the evidence, and the matter having been duly submitted for decision, the court on April 9, 1965, rendered its Findings of Fact and Conclusions of Law:

(1) That Pauline Schrader died intestate in Portland, Oregon, on or about September 30, 1962; leaving an estate of real and personal property situated in Oregon; that said decedent was survived by a brother Oswald Zschernig and a sister Minna Pabel, and four other relatives, all named as plaintiffs in the petition for determination of heirship filed herein; that all of said relatives are residents and inhabitants of the German Democratic Republic of East Germany.

(2) That the evidence before the court did not establish the existence of reciprocity of inheritance rights as required by ORS 111.070 with respect to the German Democratic Republic of East Germany at the date of death of Pauline Schrader.

(3) That the 1923 Treaty of Friendship, Commerce and Consular Rights between the United States of America and Germany is no longer in existence and has no bearing upon the rights of the parties herein.

(4) That the 1954 Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany, is restricted to the territorial limits set out in the treaty itself which

excludes the territory under the government of the German Democratic Republic of East Germany, and, therefore, inhabitants of East Germany take no rights under the treaty.

(5) That ORS 111.070 does not invade the exclusive [fol. 12] power of the Federal Government to regulate the foreign relations of the United States.

(6) That the clear proceeds of this estate situated in the State of Oregon have escheated to and become the property of the State of Oregon as of the date of death of said decedent Pauline Schrader and the clear proceeds thereof are distributable to the State Land Board of the State of Oregon for payment into the Common School Fund.

Based on the above findings of fact and conclusions of law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the petition of the State of Oregon, acting by and through the State Land Board, for finding and order of escheat is hereby granted, and

IT IS FURTHER ORDERED that the administrator of this estate pay and deliver the clear proceeds of this estate situated in the State of Oregon to the State Land Board of the State of Oregon for payment into the Common School Fund.

IT IS FURTHER ORDERED that the costs in this proceeding be charged against the estate.

No. 8136

IN THE SUPREME COURT OF THE STATE OF OREGON
Department 2.

In the Matter of the Estate of
PAULINE SCHRADER, Deceased.
ZSCHERNIG et al., Appellants,
v.
MILLER et al., Respondents.

Appeal from Circuit Court, Multnomah County.

WILLIAM L. DICKSON, Judge.

Argued and submitted February 3, 1966.

Peter A. Schwabe (Sr.), Portland, argued the cause and filed the brief for appellants.

Walter L. Barrie, Assistant Attorney General, Salem, argued the cause for respondents. With him on the brief was Robert Y. Thornton, Attorney General of Oregon, Salem.

OPINION—March 23, 1966

Before McALLISTER, Chief Justice, and SLOAN, DENECKE, HOLMAN and LUSK, Justices.

Modified and remanded with directions.

HOLMAN, J.

Pauline Schrader, a resident of Oregon, died intestate on September 30, 1962. She left an estate comprised of both real and personal property. Her next of kin were a brother and sister, two nieces and two nephews, all of whom are

nonresident aliens residing in the Soviet-occupied zone of Germany, hereinafter referred to as East Germany.¹ These relatives, as plaintiffs, brought a proceeding for a determination [fol. 14] of heirship in their favor. This was contested by the State of Oregon, through its State Land Board, which requested that the property be escheated to the state.

ORS 111.070² provides that the right of nonresident aliens to take property from Oregon estates is dependent upon (1) the reciprocal right of the citizens of the United States similarly to take property from estates in the country of which the alien is an inhabitant or citizen; (2) the right of

¹ By referring to this area as "East Germany" we do not pass judgment on the political question whether Germany is a divided state or country with more than one government.

² ORS 111.070 states as follows:

"(1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:

"(a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such an alien is an inhabitant or citizen;

"(b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and

"(c) Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.

"(2) The burden is upon such nonresident alien to establish the fact of existence of the reciprocal rights set forth in subsection (1) of this section.

"(3) If such reciprocal rights are not found to exist and if no heir, devisee or legatee other than such alien is found eligible to take such property, the property shall be disposed of as escheated property."

citizens of the United States to receive in this country money originating from estates in such foreign country; and (3) proof that such aliens will receive the benefit of money or property from estates in this state without confiscation in whole or part by such foreign country. The stat-[fol. 15] ute further provides that if these three prerequisites are not found to exist and there are no other heirs, the property will escheat to the State of Oregon. *State Land Board v. Pekarek*, 234 Or 74, 76-79, 378 P2d 735 (1963).

The trial court found that the evidence did not establish the existence of reciprocal rights to take property from or to receive the proceeds of East German estates at the date of decedent's death, that ORS 111.070 was valid and controlling, and that the proceeds of the estate escheated to the State of Oregon. Plaintiffs appealed.

Plaintiffs refer this court to Article IX, paragraph 3 of the Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, October 29, 1954, 7 U.S.T. & O.I.A. 1839, TIAS No. 3593 (effective July 14, 1956), hereinafter referred to as the 1954 Treaty, which was negotiated by the United States with the government having jurisdiction over that territory known popularly as West Germany. They contend that it extends to them, as East German residents, reciprocal rights of inheritance.

Article IX, paragraph 3, of the 1954 Treaty provides as follows:

"Nationals and companies of either Party shall be accorded national treatment, within the territories of the other Party, with respect to acquiring property of all kinds by testate or intestate succession or under judicial sale to satisfy valid claims. Should they because of their alienage be ineligible to continue to own any such property, they shall be allowed a period of at least five years in which to dispose of it."

[fol. 16] "National treatment" is defined by Article XXV, paragraph 1:

"The term 'national treatment' means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party."

This raises the question whether East German residents are entitled to the benefits of the treaty. Plaintiffs contend that all citizens of Germany, East and West, are encompassed by the terms of the treaty because the state of Germany and its nationals continue to exist despite Germany's defeat and occupation by the allied forces. This argument is founded on Art. 116(1) of the Constitution of Germany. 2 Peaslee, *Constitutions of Nations* 53 (2d ed, 2d printing 1956). It is also based upon the international law doctrine concerning state succession. 2 Whiteman, *Digest of International Law* 754-761, 787-799 (1963). The plaintiffs correctly contend that the West German government is the only legally constituted government of the state of Germany recognized by the United States. 2 Whiteman, *supra* at 794-795. From this line of reasoning they deduce that the 1954 Treaty entered into with the United States by the West German government was for the benefit of all Germans.

Courts of law are required to interpret treaties as any other contract by giving effect to the intent of the parties as manifested by the terms thereof. *Sullivan v. Kidd*, 254 US 433, 439, 41 S Ct 158, 65 L Ed 344 (1921); *Maximov v. United States*, 373 US 49, 54, 83 S Ct 1054, 10 L Ed 2d 184 (1963); Restatement (Second), Foreign Relations § 146 (1965). Article IX, paragraph 3 of the 1954 Treaty accords [fol. 17] "national treatment, within the territories of the other Party." The "territories" referred to are delineated by Article XXVI of the treaty, which provides, in part:

"1. The territories to which the present Treaty extends shall comprise all areas of land and water under the sovereignty or authority of each Party, other than

the Panama Canal Zone and the Trust Territory of the Pacific Islands.

"2. The present Treaty shall also apply * * * to Land Berlin which for the purposes of the present Treaty comprises those areas over which the Berlin Senate exercises jurisdiction."

This language seems to say that the 1954 Treaty was meant to apply only to that geographic area of Germany over which the government of West Germany exercises its jurisdiction.

In the interpretation of treaties, "the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight," *Kolovrat v. Oregon*, 366 US 187, 194, 81 S Ct 922, 6 L Ed 2d 218 (1961); *Sullivan v. Kidd*, supra at 442. This does not mean, however, that courts are necessarily bound by the interpretation of the executive branch., Restatement (Second), Foreign Relations § 152 (1965). The State Department of the United States has declared the position of our government with respect to Article XXVI of the 1954 Treaty as follows:

"Pursuant to that provision in Article XXVI, therefore, the treaty applies with respect to all territory under United States jurisdiction other than that specifically excluded and to all territory under the sovereignty or authority of the Federal Republic of Germany. Consequently, the 1954 treaty does not apply with respect to the territory commonly referred to as East Germany [fol. 18] many." Letter of February 13, 1964, from Ely Maurer, Assistant Legal Adviser for European Affairs, to Attorney General of Oregon Robert Y. Thornton.

To the contrary, however, the position of the West German government, as contained in a Foreign Office certifi-

cate issued at Bonn on September 30, 1963, and introduced into evidence, is as follows:

"It is the position of the Government of the Federal Republic of Germany that the rights granted by Article IX, Paragraph 3 of the Treaty of Friendship, Commerce and Navigation * * * are due and accorded to all German citizens. A citizenship of the Federal Republic of Germany as distinct from a citizenship of the Soviet occupied zone which might possibly give rise to a different application of Article IX, Paragraph 3 of the said treaty does not exist."

It is the belief of this court that neither German citizenship nor nationality has real bearing on this issue because territorial application of the 1954 Treaty, by the terms of Article XXVI, is governed by sovereignty. The West German government has no sovereign authority over that geographical area known as East Germany. The interpretation of the State Department of the United States seems to us to be the only reasonable interpretation of the language of Article XXVI. We believe it was not the intent of the United States and West Germany, at the time of making the 1954 Treaty, to extend its provisions to residents of East Germany.

The situation here differs from those prevailing in the cases of *Estate of Nepogodin*, 134 Cal App 2d 161, 185 P2d 672 (1955), and *Mullart v. State Land Board*, 222 Or 463, 353 P2d 531 (1960), relied upon by plaintiffs. In those cases [fol. 19] the relevant treaties applied to the country or state as a whole. In this case, however, the 1954 Treaty specifically provides that its geographic application is to an area less than the state of Germany as a whole and excludes the area in which plaintiffs live.

Plaintiffs contend that if the 1954 Treaty is inapplicable Articles IV and XXV of the Treaty of Friendship, Commerce and Consular Rights with Germany, December 8, 1923, 44 Stat 2132, T.S. No. 725 (effective October 14, 1925)

amended June 3, 1935, 49 Stat 3258, T.S. No. 897, hereinafter referred to as the 1923 Treaty, are applicable.

The state of Oregon contends that the 1923 Treaty has been abrogated by virtue of subsequent events. Article XXVIII of the 1954 Treaty with the West German government provides as follows:

"The present Treaty shall replace and terminate provisions in force in Articles I through V * * * of the treaty of friendship, commerce and consular rights between the United States of America and Germany, signed at Washington December 8, 1923 * * *."

The 1954 Treaty thus purports to abrogate Article IV of the 1923 Treaty, dealing with the rights of individuals to take property. However, the 1954 Treaty, as previously pointed out, explicitly extends only to those areas over which West Germany has sovereignty. This does not include East Germany. Its provisions would therefore not affect the application of the 1923 Treaty to East Germany. This conclusion has also been reached by the United States State Department. The Department has said:

"* * * Since the Federal Republic of Germany was the Party to the 1954 Treaty the provisions of that Treaty apply solely with regard to the area of the Federal [fol. 20] eral Republic of Germany. Consequently, the 1954 Treaty does not apply with respect to that part of Germany outside the Federal Republic of Germany commonly referred to as East Germany, and Article XXVIII of the 1954 Treaty does not apply with regard to East Germany. As far as East Germany is concerned, Article IV of the 1923 Treaty has not been replaced through the operation of Article XXVIII of the 1954 Treaty." Letter of February 24, 1964, from Ely Maurer, Assistant Legal Adviser for European Affairs, to Attorney General of Oregon Robert Y. Thornton.

Since the enactment of the 1923 Treaty, World War II has ensued, Germany has been defeated and occupied, and the Soviet government has created a regime in East Germany which is not recognized by the United States as a legal government. The United States government still treats East Germany as Soviet-occupied territory of Germany. No treaty of peace has ever been consummated.³ What then is the status of the 1923 Treaty as it relates to East Germany?

In considering whether the many changes in Germany's status would abrogate the treaty, the case of *Clark v. Allen*, 331 US 503, 67 S Ct 1431, 91 L Ed 1633 (1947), must be considered. In that case the decedent died in 1942 a resident [fol. 21] of California leaving real and personal property there. She bequeathed her entire estate to four relatives who were nationals and residents of Germany. The Alien Property Custodian instituted an action against the executor of the estate and California heirs-at-law to determine that the California heirs-at-law had no interest in the estate and that he was entitled to the entire estate as the representative of the German nationals. The heirs-at-law claimed the German nationals were ineligible as legatees because a reciprocity requirement of California law similar to that of Oregon could not be satisfied.

The court there held that the 1923 Treaty between the United States and Germany was not entirely abrogated by the outbreak of World War II and the enactment of the

³ No peace treaty has been signed by all the belligerents to World War II. See 1 Whiteman, Digest of International Law, 331-336 (1963). In substitution therefor, the United States, Great Britain, France, and West Germany entered into a Protocol concerning Termination of the Occupation Regime in the Federal Republic of Germany, October 23, 1954, 6 U.S.T. & O.I.A. 4117, TIAS No. 3425 (effective May 5, 1955) containing a Convention on Relations Between the Three Powers and the Federal Republic of Germany, 6 U.S.T. & O.I.A. at 4251, by which the occupying nations revoked the occupied status of Germany and retained limited rights pending reunification of Germany and a peace settlement.

Trading with the Enemy Act. It held that the treaty provisions regarding descent and distribution of property were still in effect. The court said as follows:

"We start from the premise that the outbreak of war does not necessarily suspend or abrogate treaty provisions. *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 494-495. There may of course be such an incompatibility between a particular treaty provision and the maintenance of a state of war as to make clear that it should not be enforced. *Karnuth v. United States*, 279 U.S. 231. Or the Chief Executive or the Congress may have formulated a national policy quite inconsistent with the enforcement of a treaty in whole or in part. This was the view stated in *Techt v. Hughes*, *supra*, and we believe it to be the correct one. * * * " 331 US 508-509.

In *Techt v. Hughes*, 229 NY 222, 128 NE 185, cert. denied 254 US 643 (1920), Cardozo, J., stated:

" * * * The question is not what states *may* do after [fol. 22] war has supervened, and this without breach of their duty as members of the society of nations. The question is what courts are to presume that they have done. * * * President and senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts (*Fong Yue Ting v. U.S.*, 149 U.S. 698). The treaty of peace itself may set up new relations, and terminate earlier compacts either tacitly or expressly. * * * But until some one of these things is done, until some one of these events occurs, while war is still flagrant, and the will of the political departments of the government unrevealed, the courts, as I view their function, play a humbler and more cautious part. It is not for them to denounce treaties generally, *en bloc*. Their part it is, as one provision or another is involved in some actual controversy before

them, to determine whether, alone, or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace. The mere fact that other portions of the treaty are suspended or even abrogated is not conclusive. The treaty does not fall in its entirety unless it has the character of an indivisible act." 229 NY at 243, 128 NE at 192.

Concerning the continued applicability of the 1923 Treaty, Mr. Justice Douglas said, in *Clark v. Allen*, supra at 513-514:

" * * * We have no reliable evidence of the intention of the high contracting parties outside the words of the present treaty. The attitude and conduct under earlier treaties, reflecting as they did numerous contingencies and conditions, leave no sure guide to the construction of the present treaty. Where the relevant historical sources and the instrument itself give no plain indication that it is to become inoperative in whole or in part on the outbreak of war, we are left [fol. 23] to determine, as *Techt v. Hughes*, supra, indicates, whether the provision under which rights are asserted is incompatible with national policy in time of war. So far as the right of inheritance of realty under Article IV of the present treaty is concerned, we find no incompatibility with national policy, for reasons already given."

What of the effect of the events subsequent to the termination of World War II? Is the provision of the treaty under which the right to inherit is asserted incompatible with present national policy? At the time *Clark v. Allen*, supra, was decided the war was over and Germany had been occupied by the Allies. The court said as follows:

"It is argued, however, that the Treaty of 1923 with Germany must be held to have failed to survive the war, since Germany, as a result of its defeat and the occupation by the Allies, has ceased to exist as an independent national or international community. *But the question whether a state is in a position to perform its treaty obligations is essentially a political question.* *Terlinden v. Ames*, 184 U.S. 270, 288. We find no evidence that the political departments have considered the collapse and surrender of Germany as putting an end to such provisions of the treaty as survived the outbreak of the war or the obligation of either party in respect of them. * * *" 331 US at 514 (emphasis ours).

The world political situation has vastly changed in the nearly twenty years since the decision in *Clark v. Allen*, supra. As previously pointed out, the Soviet government has purported to turn over power in East Germany to a regime which is not recognized by the United States. However, the executive branch of the United States government, which is charged with the negotiation and interpretation of treaties, has recently indicated publicly its attitude concerning the continued effectiveness of Article IV of the 1923 Treaty and its application to East Germany. A document published by the Treaty Affairs Staff, Office of the Legal Adviser, United States State Department dated September 30, 1965, entitled "Treaty Provisions Relating to the Rights of Inheritance and Acquisition and Ownership of Property in Force between the United States and Other Countries," states at page 19, note 3, as follows:

"[The 1954] Treaty is applicable to the area of Germany constituting the Federal Republic and Land Berlin. It appears that Article IV of the treaty of friendship, commerce, and consular rights between the United States and Germany signed on December 8, 1923 (44 Stat. 2132), which contains provisions relating to

rights of inheritance of and succession to property, continues in force with respect to areas of Germany not presently included in the territory of the Federal Republic and Land Berlin. The entry into force of the 1954 treaty between the United States and the Federal Republic, which replaced and terminated Article IV of the 1923 treaty with respect to the area of Germany constituting the Federal Republic and Land Berlin, had no effect on the 1923 treaty with respect to the area of Germany not included in the Federal Republic and Land Berlin. * * *

This indicates that the United States government still considers Article IV of the 1923 Treaty in effect with relation to East Germany. While that attitude of the United States government is not binding upon this court in an adjudication of title to private property, *Clark v. Allen*, supra at 517, the State Department document is entitled to great weight. *Kolovrat v. Oregon*, supra at 194; *Sullivan v. Kidd*, supra at 442. This is particularly true in view of the fact that whether that part of Germany known as East Germany is in a position to perform its treaty obligations [fol. 25] is essentially a political question. In the case of *Estate of Nepogodin*, 134 Cal App 2d 161, 285 P2d 672 (1955), the court considered whether communist control of Manchuria, the part of China where decedent's heirs resided, was such as to invalidate a treaty with Nationalist China which was used as evidence of reciprocal rights of inheritance. The court there said, at page 170:

" * * * The ratification exchange shows that the United States Government did not then consider the conditions existing in China an unsurmountable obstacle to the effectiveness of the Treaty. It had not denounced the Treaty at the date of decedent's death. As to the ability of a foreign state to perform its treaty obligations and as to the question whether a treaty has been terminated the action of the political depart-

ments of our government is controlling. (*Clark v. Allen*, 331 U.S. 503, 514 [67 S. Ct. 1431, 91 L.Ed. 1633, 170 A.L.R. 953]; *Terlinden v. Ames*, 184 U.S. 270, 285, 288 [22 S.Ct. 484, 46 L.Ed. 534].) * * *

In *Terlinden v. Ames*, 184 US 270, 277-278, 22 S Ct 484, 46 L Ed 534, the court said:

" * * * Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture. 1 Kent, Com. 174. * * *

"We concur in the view that the question whether power remains in a foreign state to carry out its treaty obligations is in its nature political and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard."

[fol. 26] *Terlinden v. Ames*, *Clark v. Allen*, and *Estate of Nepogodin* all say that the ability of a foreign country to comply with its treaty obligations is essentially a political question. In view of these cases and the present attitude of the State Department, we apply the principle of judicial abstention to the question of whether a foreign state is able to carry out its treaty obligations and therefore whether the United States is still bound.⁴ The political department

⁴ Restatement (Second), Foreign Relations § 152, comment c; Reporters' Note (1965) states:

"The 'political question' doctrine as it relates to interpretation of international agreements. The principle of judicial abstention has been applied to, among others, the following types of questions arising in litigation involving international agreements:

(continued on following page)

of the federal government particularly charged with the negotiation and enforcement of the treaty in question has determined that the United States is still obligated. We therefore hold Articles IV and XXV of the 1923 Treaty to be still in effect as they apply to the territory of East Germany.

Plaintiffs contend that the provisions of ORS 111.070 are in conflict with Articles IV and XXV of the 1923 Treaty and that the statute must yield to the terms of the treaty. In so far as Article IV provides for the reciprocal taking of property by the nationals of one country from decedents' estates in the other upon the same conditions as citizens of such other state, it is in conformance with the reciprocal provisions of ORS 111.070 (1)(a). However, the statute in (1)(b) and (c) establishes two additional prerequisites [fol. 27] to the vesting or taking by alien nationals of property from Oregon estates, neither of which is demanded by the treaty. These requirements are (1)(b) that citizens of the United States be able to receive payment here of money originating from estates in the foreign country and (1)(c) that beneficiaries of Oregon estates residing in such foreign country be able to receive there, without confiscation, money originating from such estates. Decedent's foreign relatives have not shown that subsections (1)(b) and (c) can be complied with as required by ORS 111.070 (2). They do not even contend that the requirements of (1)(b) can be met. However, these additional prerequisites to vesting are in contravention of the rights granted by the terms of the treaty.

A state statute in contravention of a treaty between the United States and a foreign government must yield to that treaty. *State Land Board v. Kolovrat*, 220 Or 448, 462, 349

"(c) Whether a foreign state still has power to carry out its treaty obligations and whether the United States is therefore still bound. *Terlinden v. Ames*, 184 U.S. 270 (1902); *Charlton v. Kelly*, 229 U.S. 447 (1913); *Clark v. Allen*, 331 U.S. 503 (1947)."

P2d 255 (1960), rev'd on other grounds, *Kolovrat v. Oregon*, 366 US 187, 190, 81 S Ct 922, 6 L Ed 2d 218 (1961); *Clark v. Allen*, supra at 508, 517; *Hauenstein v. Lynham*, 100 US 483, 488-490, 25 L Ed 628 (1880); *Ware v. Hylton*, 3 US [3 Dall] 199, 236, 1 L Ed 568 (1796). Therefore, the requirements of ORS 111.070 (1)(b) and (c) must yield to the treaty where the treaty applies.

Having held the 1923 Treaty still in effect as to that territory of Germany known as East Germany and the provisions of ORS 111.070 (1)(b) and (c) of no effect when in conflict therewith, we must now turn to the specific provisions of the treaty for the purpose of determining whether they grant plaintiffs the right to inherit decedent's property. Article IV of the treaty provides as follows:

"Where, on the death of any person holding real or [fol. 28] other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference * * *.

"Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the

payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases."

This is the same article of the same treaty which was construed in *Clark v. Allen*, supra; so we again turn to that case for the construction of its terms. The court said, in reference to the second paragraph of Article IV concerning personal property, as follows:

"A practically identical provision of the Treaty of 1844 with Württemberg [sic], Art. III, 8 Stat. 588, was before the Court in *Frederickson v. Louisiana*, 23 How. 445. In that case the testator was a citizen of the United States, his legatees being citizens and residents of Württemberg. Louisiana, where the testator was domiciled, levied a succession tax of 10 per cent on legatees not domiciled in the United States. The Court held that the treaty did not cover the 'case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other . . . ' pp. 447-448. That decision was made in 1860. In 1917 the Court followed it in cases involving three other treaties. *Peterson v. Iowa*, 245 U.S. 170; *Duus v. Brown*, 245 U.S. 176; *Skarderud v. Tax Commission*, 245 U.S. 633.

"The construction adopted by those cases is, to say the least, permissible when the syntax of the sentences dealing with realty and personalty is considered. So far as realty is concerned, the testator includes 'any person'; and the property covered is that within the territory of either of the high contracting parties. In case of personalty [sic], the provision governs the right of 'nationals' of either contracting party to dispose of their property *within the territory of the 'other' contracting party*; and it is 'such personal property'

that the 'heirs, legatees and donees' are entitled to take." 331 US 515 (emphasis ours).

This is dispositive of any contention of the plaintiffs in this case that the 1923 Treaty is applicable to the personal property of decedent. The treaty does not cover personal property located in this country which an American national undertakes to leave to German nationals.⁵ Not being applicable, there can be no conflict between its terms and ORS 111.070 regarding disposition of decedent's personal property. ORS 111.070 controls and decedent's German relatives have not made the showing necessary to bring them within its terms.

Plaintiffs argue, however, that even if the provision of Article IV of the treaty is inapplicable, the personal property may not be escheated pursuant to the Oregon statute because the statute is an unconstitutional attempt by the state to invade the exclusive power of the federal government to regulate the foreign relations of the United States. They contend that the statute violates Article I, Section 10 of the United States Constitution. They imply that the subject matter of the statute is within the treaty-making power of the federal government and is an area of legislation from which the states are excluded by virtue of Article VI of the Constitution. This argument was also put to bed by *Clark v. Allen*, supra. The court was there dealing with a California statute similar to ORS 111.070. It was argued that the statute was an unconstitutional "extension of state power into the field of foreign affairs, which is exclusively reserved by the Constitution to the Federal Government." 331 US at 516. The court held that a state statute governing the descent and distribution of property must give way

⁵ In *Clark v. Allen*, as here, there was no showing as to the nationality of decedent. We are presuming, in the absence of a showing to the contrary, as the United States Supreme Court did in that case (331 U.S. at 516), that decedent was a national of the United States, her country of residence at the time of her death.

only if there is a conflict with "an overriding federal policy as where a treaty makes different or conflicting arrangements. *Hauenstein v. Lynham, supra.*" 331 US at 517 (emphasis ours).

We now turn to the first paragraph of Article IV of the 1923 Treaty which pertains to real property. We again quote from *Clark v. Allen*, which states in regard to this paragraph as follows:

"The rights secured are in terms a right to sell within a specified time plus a right to withdraw the proceeds and an exemption from discriminatory taxation. It is plain that those rights extend to the German heirs of 'any person' holding realty in the United States. And though they are not expressed in terms of ownership or the right to inherit, that is their import and meaning. *Techt v. Hughes*, 229 N.Y. 222, 240, 128 N.E. 185, 191; *Ahrens v. Ahrens*, 144 Iowa 486, 489, 123 N.W. 164, 166. And see *People v. Gerke*, 5 Cal. 381; *Scharpf v. Schmidt*, 127 Ill. 255, 50 N.E. 182; *Colson v. Carlson*, 116 Kan. 593, 227 P. 360; *Goos v. Brocks*, 117 Neb. 750, 223 N.W. 13.

"If, therefore, the provisions of the treaty have not been superseded or abrogated, they prevail over any requirements of California law which conflict with them. *Hauenstein v. Lynham*, 100 U.S. 483, 488-490." 331 US at 508.

The 1923 Treaty provision has thus been construed to vest the title to real property of estates in this country in German heirs or devisees. The requirements of ORS 111.070 (1)(b) and (c) place additional requirements upon such vesting and are therefore in conflict with the treaty and are of no effect. The provisions of the statute cannot operate to bar the right of the German heirs to inherit the real property.

The court realizes there is the practical problem of delivery of any benefits of the real property to the heirs at

law in East Germany. The United States government does not recognize the regime established there and has no diplomatic relations with it. Also, the United States Treasury Department has issued the following:

"§ 211.2(a). It is hereby determined that postal, transportation, or banking facilities in general or local conditions in * * * the Russian Zone of Occupation of Germany, and the Russian Sector of Occupation of Berlin, Germany, are such that there is not a reason-[fol. 32] able assurance that a payee in those areas will actually receive checks or warrants drawn against funds of the United States, or agencies or instrumentalities thereof, and be able to negotiate the same for full value." Treasury Dept. Circular 655, revised Nov. 14, 1964, 29 Fed. Reg. 15287, 31 C.F.R. 141 (1965).

This court has determined that this official declaration may be regarded "as evidence that foreign beneficiaries would not receive their interests free from control amounting to, at least, a partial confiscation." *State Land Board v. Pekarek*, 234 Or 74, 82, 378 P2d 735 (1963).

Article XXV of the 1923 Treaty, which we have held to be still in force as applied to East Germany, provides as follows:

"A consular officer of either High Contracting Party may in behalf of his non-resident countrymen receipt for their distributive shares derived from estates in process of probate * * * provided he remit any funds so received through the appropriate agencies of his Government to the proper distributees, and provided further that he furnish to the authority or agency making distribution through him reasonable evidence of such remission."

Plaintiffs, therefore, claim the West German Consul is authorized to receive funds for them to be invested for

their benefit by the West German government until such time as they may receive the funds.

Although Article XXV of the 1923 Treaty was incorporated into and made a part of the 1954 Treaty, we have, in this opinion, held that the 1954 Treaty does not extend to those persons who reside in that area over which West Germany does not have sovereignty. For that reason West [fol. 33] German consular officers have no authority under the 1954 Treaty to act for and receive property for persons residing in East Germany.

The United States government has taken a similar view that West German Consuls have no authority to act on behalf of German nationals residing in East Germany. The following is an excerpt from a letter released by the Office of the Legal Adviser, Department of State, May 23, 1962:

"The United States does not recognize the regime in Eastern Germany as either a state or a government. The United States considers that the area is under the effective control of the Soviet Union * * *.

"* * * the position of the Department of State has been that consuls of the Federal Republic are not authorized to act on behalf of German nationals residing in Eastern Germany." Quoted in *Contemporary Practice of the United States Relating to International Law*, 57 Am J Int'l L 403, 410 (1963).

The fact that plaintiffs cannot immediately receive the benefit of decedent's real property does not mean that they cannot inherit or own it because we have determined that ORS 111.070 (1)(c), which makes their ability to receive the benefits of the property in East Germany a prerequisite to vesting of title, must yield to Article IV of the 1923 Treaty with Germany, which has been construed in *Clark v. Allen*, supra, as granting the rights of inheritance and ownership. The German heirs at law are now the owners of real property in this state.

The decree of the trial court is modified in that plaintiffs [fol. 34] are declared to be decedent's heirs at law in respect to her real property only, and these proceedings are remanded for the entry of an order determining heirship in conformance with this opinion.

[fol. 35]

IN THE SUPREME COURT OF THE STATE OF OREGON, SALEM

In the Matter of the Estate of

PAULINE SCHRADER, Deceased.

OSWALD ZSCHERNIG, MINNA PABEL, OLGA HERTA WINCKLER,
ALFRED KOESTER, JOHANNA BLASCHKE and HANS FUESSEL,
Appellants,

v.

WILLIAM J. MILLER, Administrator of the Estate of PAULINE SCHRADER, Deceased, MARK O. HATFIELD, TOM MCCALL and ROBERT W. STRAUB, respectively the Governor, Secretary of State and State Treasurer of Oregon, constituting the State Land Board of Oregon, and all persons unnamed or unknown having or claiming any interest in the Estate of PAULINE SCHRADER, Deceased, Respondents.

ORDER—March 23, 1966

This cause on February 3, 1966, having been duly argued and submitted upon and concerning all questions arising upon the record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is partial error.

It Therefore Is Considered, Ordered and Decreed that the order of escheat of the court below rendered and entered in this cause be and the same hereby is modified in that plaintiffs are declared to be decedent's heirs at law in respect to her real property only, and that the cause be

remanded to said court with directions to enter an order determining heirship in conformity with the opinion of the court herein and in accordance therewith.

It Further Is Ordered that appellants have and recover of and from respondents their costs and disbursements in this court taxed at \$41.00.

[fol. 36]

No. 8207

IN THE SUPREME COURT OF THE STATE OF OREGON
IN BANC

In the Matter of the Estate of
PAULINE SCHRADER, Deceased
ZSCHERNIG et al., Appellants,

v.

MILLER et al., Respondents.

Appeal from Circuit Court, Multnomah County.

WILLIAM L. DICKSON, Judge.

On appellants' petition for rehearing filed April 26, 1966.
Former opinion filed March 23, 1966. 82 Adv Sh 435, —
Or —, 412 P2d 781.

Peter A. Schwabe (Sr.) Portland, for the petition.

Before McAllister, Chief Justice, and Perry, Sloan,
Goodwin, Denecke, Holman and Lusk, Justices.

Petition denied.

OPINION—June 3, 1966

Holman, J.

Plaintiffs, in a petition for rehearing, again direct our
attention to *Mullart v. State Land Board*, 222 Or 463, 353

P2d 531 (1960). That case held that Estonian nationals had a right to inherit personal as well as real property from estates in the United States of American nationals. The provisions of Article IV of the 1925 treaty with Estonia, 44 Stat 2379, T.S. No. 736, are identical with those of Article IV of the 1923 treaty with Germany construed in the principal opinion in this case. Plaintiffs argue, therefore, that the *Mullart* case requires this court to permit them to inherit the personal as well as the real property of the deceased despite the contrary holding in *Clark v. Allen*, 331 US 503, 67 S Ct 1431, 91 L Ed 1633 (1947).

Article IV of the Estonian treaty was not relied on in *Mullart*. The court there held that the Estonian legatee had the right to inherit because the reciprocal provision of the Oregon statute, which required that United States nationals be permitted to inherit from estates in the country of the alien heir, devisee or legatee, *was satisfied by Estonian law*. It was therefore unnecessary to consider or rely on the effect of Article IV of the treaty. By contrast, plaintiffs' right to inherit in this case depended upon the language of Article IV of the 1923 German treaty. Therefore, there is no conflict between this court's holding in *Mullart* and the principal opinion in this case.

The petition for rehearing is denied.

[fol. 38]

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of the Estate of

PAULINE SCHRADER, Deceased.

OSWALD ZSCHERNIG, MINNA PABEL, OLGA HERTA WINCKLER,
ALFRED KOESTER, JOHANNA BLASCHKE and HANS FUESSEL,
Appellants,

v.

WILLIAM J. MILLER, Administrator of the Estate of Pauline Schrader, Deceased, MARK O. HATFIELD, TOM MCCALL and ROBERT W. STRAUB, respectively the Governor, Secretary of State and State Treasurer of Oregon, constituting the STATE LAND BOARD OF OREGON, and all persons unnamed or unknown having or claiming any interest in the Estate of Pauline Schrader, Deceased, Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed August 31, 1966

I. Notice is hereby given that Oswald Zschernig, Minna Pabel, Olga Herta Winckler, Alfred Koester, Johanna Blaschke and Hans Fuessel, the appellants above named, hereby appeal to the Supreme Court of the United States from the final opinion/order of the Supreme Court of the State of Oregon dated and entered on March 23, 1966, modifying as therein set forth the order of escheat dated and entered by the Circuit Court of the State of Oregon for the County of Multnomah on April 15, 1965, which said opinion/decreed of March 23, 1966, was affirmed by the opinion of the Supreme Court of the State of Oregon rendered June 3, 1966, denying appellants' petition for rehearing. The Mandate of said Court was issued on June 8, 1966, and this appeal is also taken therefrom.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

[File endorsement omitted]

II. The Clerk of the Supreme Court of Oregon will please prepare a transcript of the Record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Appellants' Abstract of Record and Brief.
- [fol. 39]
2. Respondent State Land Board's Brief.
3. Appellants' Reply Brief.
4. Complete transcript of the testimony taken at the trial of this cause in the Circuit Court of Multnomah County, Oregon, consisting of two volumes, No. I being of the proceedings held April 28, 1964, and No. II of the proceedings held August 18, 1964, and April 9, 1965.
5. All Exhibits offered and received at the trial, except Petitioners' Exhibits Nos. 1, 2, 3 and 17 to 23, both inclusive [which are wholly irrelevant to this appeal].
6. The Opinion of this Court filed March 23, 1966 (82 Adv Sh 435, — Or — 412 P2d 781)
7. Petition for Rehearing and Brief.
8. The Opinion of this Court denying the petition for rehearing, filed June 3, 1966. (82 Adv Sh 861, — Or — 415 P2d 15)
9. The Mandate of this Court issued June 8, 1966.
10. This Notice of Appeal.

III. The following questions are presented by this appeal:

1. Is Section 111.070, Oregon Revised Statutes [the so-called reciprocal inheritance rights law] repugnant to Article I, § 10 of the Constitution of the United States, in

that said statute constitutes an unlawful invasion by the State of Oregon of the exclusive power of the Federal Government to regulate the foreign relations of the United States?

2. Is Section 111.070, Oregon Revised Statutes, repugnant to Article I, § 8 of the Constitution of the United States in that said statute constitutes an unlawful invasion by the State of Oregon of the exclusive power of the Federal Government to regulate the foreign commerce of the United States?

3. Is Section 111.070, Oregon Revised Statutes, repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in that it deprives persons residing in the Soviet-occupied zone of Germany of their property without due process of law?

[fol. 40]

4. Should Section 111.070, Oregon Revised Statutes, be declared invalid and given no effect because it conflicts with overriding federal law and policy?

Dated at Portland, Oregon, this 30th day of August, 1966.

Peter A. Schwabe, Sr., Peter A. Schwabe, Jr.,
Attorneys for Appellants, Office & P. O. Address:
721 Pacific Building, Portland, Oregon 97204,
Area Code 503, 223-7328.

Proofs of Service (omitted in printing).

[fol. 141] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 42]

SUPREME COURT OF THE UNITED STATES

No. 730 — October Term, 1966

OSWALD ZSCHERNIG, et al., Appellants,

v.

WILLIAM J. MILLER, Administrator, et al.

Appeal from the Supreme Court of the State of Oregon.

ORDER NOTING PROBABLE JURISDICTION—May 8, 1967

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

FILED

OCT 28 1966

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM 1966

No. 730 121

In the Matter of the Estate of
PAULINE SCHRADER, Deceased.

**OSWALD ZSCHERNIG, MINNA PABEL, OLGA HERTA
WINCKLER, ALFRED KOESTER, JOHANNA BLASCHKE
and HANS FUESSEL,**

Appellants,

v.

**WILLIAM J. MILLER, Administrator of the Estate of
Pauline Schrader, Deceased, MARK O. HATFIELD,
TOM McCALL and ROBERT W. STRAUB, respectively
the Governor, Secretary of State and State Treasurer
of Oregon, constituting the STATE LAND BOARD OF
OREGON, and all persons unnamed or unknown having
or claiming any interest in the Estate of Pauline
Schrader, Deceased,**

Appellees.

Appeal from the Supreme Court of the State of Oregon

JURISDICTIONAL STATEMENT

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Appellee administrator Miller as stakeholder not
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In the Supreme Court of the United States

OCTOBER TERM 1966

No. _____

In the Matter of the Estate of
PAULINE SCHRADER, Deceased.

**OSWALD ZSCHERNIG, MINNA PABEL, OLGA HERTA
WINCKLER, ALFRED KOESTER, JOHANNA BLASCHKE
and HANS FUESSEL,**

Appellants,

v.

**WILLIAM J. MILLER, Administrator of the Estate of
Pauline Schrader, Deceased, MARK O. HATFIELD,
TOM McCALL and ROBERT W. STRAUB, respectively
the Governor, Secretary of State and State Treasurer
of Oregon, constituting the STATE LAND BOARD OF
OREGON, and all persons unnamed or unknown having
or claiming any interest in the Estate of Pauline
Schrader, Deceased,**

Appellees.

Appeal from the Supreme Court of the State of Oregon

JURISDICTIONAL STATEMENT

I. Opinions Below

The opinion of the Circuit Court of Multnomah County, Oregon, was delivered orally by the Honorable William L. Dickson, Circuit Judge, on April 9, 1965, and is not reported officially or unofficially. The re-

porter's transcript thereof is at page 9 of the Appellant's Abstract of Record and Brief before the Supreme Court of Oregon.

The opinion of the Supreme Court of Oregon filed March 23, 1966, affirming the Findings and Order of Escheat of the Circuit Court as modified is reported in 82 Or. Adv. Sh. 435, — Or. —, 412 P.2d 781:

The opinion of the Supreme Court of Oregon filed June 3, 1966, denying appellants' petition for rehearing is reported in 82 Or. Adv. Sh. 861, — Or. —, 415 P.2d 15.

The opinions of the Circuit Court and of the Supreme Court of Oregon are set forth in the Appendix, *infra*.

The Findings and Order of Escheat appealed from entered by the Circuit Court of Multnomah County, Oregon, on April 15, 1965, is at page 10 of the Appellants' Abstract of Record and Brief before the Supreme Court of Oregon, and is set forth in the Appendix, *infra*.

The Order on Mandate entered by the Circuit Court of Multnomah County, Oregon, on June 27, 1966, modifying the said Findings and Order of Escheat appealed from in the manner directed in the above mentioned opinions of the Supreme Court of Oregon, and the Mandate of said Court issued June 8, 1966, is also set forth in the Appendix, *infra*.

II. Grounds for Jurisdiction

(i) This cause originated with the filing of a Petition for Finding and Order of Escheat in the probate de-

partment of the Circuit Court of Multnomah County, Oregon, by the State Land Board of Oregon [composed of the Governor, Secretary of State and State Treasurer] which is the recipient and custodian of escheated property under Oregon law, asking that the clear proceeds of the estate of Pauline Schrader, deceased, be escheated to the State of Oregon on the grounds that the next of kin and heirs at law of said decedent reside in "East Germany," that the rights required by Section 111.070, Oregon Revised Statutes [the so-called reciprocal inheritance rights statute] do not exist with respect to "East Germany," that there are no heirs, devisees or legatees elsewhere eligible to take said decedent's estate, and that therefore the estate consisting of real and personal property of a probable value of \$20,000 had escheated to the State of Oregon. By leave of court and pursuant to Sections 117.510 to 117.560, Oregon Revised Statutes, prescribing the procedure for an heirship determination, the plaintiffs, who are the appellants here, being a brother, sister, two nieces and two nephews of the deceased [later stipulated by the parties and found by the court to be the decedent's next of kin] all residents of the Russian-occupied zone of Germany, filed a petition to determine heirship alleging themselves to be the decedent's next of kin and heirs at law and entitled to distribution of the estate. The State Land Board's answer alleged that plaintiffs were ineligible to inherit because the rights required by ORS 111.070 do not exist with respect to "East Germany," and demanded escheating of the estate to the State of Oregon. In their reply the heirs alleged

that said statute, that is ORS 111.070, is in violation of the existing policy of the Federal Government of the United States of America, constitutes an unlawful and unauthorized attempt by the State of Oregon to invade the exclusive power of the Federal Government to regulate the foreign relations of the United States and that therefore said statute is invalid and should be given no effect by the court. There were other facts and circumstances which will be mentioned later but this appeal is aimed at the trial court's ruling, subsequently affirmed by the Supreme Court of Oregon, that the statute is valid and enforceable.

For the sake of clarity and brevity the territory described as the Russian-occupied zone of Germany, the Soviet-occupied zone, the Eastern Zone, as East Germany, as the Soviet Zone, the German Democratic Republic [GDR] or the Deutsche Demokratische Republik [DDR], will be called the "Soviet Zone," consisting of that portion of Germany occupied and administered pursuant to agreement of the Allied Powers by the armed forces of the U.S.S.R. after May 8, 1945.

(ii) The judgment or decree sought to be reviewed is the Findings and Order of Escheat entered by the Circuit Court of Multnomah County, Oregon, on April 15, 1965, escheating all of the clear proceeds of the estate to the State of Oregon [Appendix p. 25] as modified by the Order on Mandate entered by said court on June 27, 1966, pursuant to the decision of the Supreme Court of Oregon on appeal [Appendix p. 28], said Order affirming the escheating of the personal

property but declaring the heirs in the Soviet Zone to be entitled to the real property in accordance with the interpretation of the 1923 treaty with Germany in *Clark v Allen*, 331 U.S. 503 (1947).

The Supreme Court of Oregon denied appellants' petition for rehearing in its opinion filed June 3, 1966 [Appendix p. 24].

The Notice of Appeal is dated August 30, 1966, and was filed in the Supreme Court of Oregon on August 31, 1966.

(iii) The statutory provision believed to confer on this Court jurisdiction of this appeal is 28 U. S. Code § 1257 (2).

(iv) Cases believed to sustain jurisdiction in the circumstances of this case are the following decisions:

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 288-9 (1922);

Fiske v. Kansas, 274 U.S. 380, 385-6 (1927);

Nashville C. & St. L. R. Co. v. Walters, 294 U.S. 405, 415 (1935);

Kern-Limerick Inc. v. Scurlock, 347 U.S. 110 (1954);

Marcus v. Search Warrant, 367 U.S. 717, 721 (1961).

(v) The statute of the State of Oregon whose validity is here involved is Section 111.070, Oregon Revised Statutes, Volume 1, page 856. It was enacted as Chapter 519, Oregon Laws 1951 (p. 900) and repealed and replaced Oregon's previous reciprocal inheritance rights statute, Section 61-107, O.C.L.A., which had orig-

inally been enacted as Chapter 399, Oregon Laws 1937 (p. 607).

ORS 111.070 provides as follows:

AN ACT

Relating to the taking of property by succession or testamentary disposition by aliens, not residing within the United States, or its territories; creating new provisions; and repealing section 61-107, O.C.L.A.

Be It Enacted by the People of the State of Oregon:

Section 1. (1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:

(a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such alien is an inhabitant or citizen;

(b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and

(c) Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit,

use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.

(2) The burden is upon such nonresident alien to establish the fact of existence of the reciprocal rights set forth in subsection (1) of this section.

(3) If such reciprocal rights are not found to exist and if no heir, devisee or legatee other than such alien is found eligible to take such property, the property shall be disposed of as escheated property.

Section 2. Section 61-107, O.C.L.A. is repealed.

Approved by the Governor May 8, 1951.

Filed in the office of the Secretary of State May 9, 1951.

[effective on and after August 2, 1951. The above is quoted from Oregon Laws 1951 and varies slightly, immaterially and in form only, from the text in Oregon Revised Statutes. The body of the statute is identical in both publications.]

III. Questions Presented

The four questions presented by this appeal as set forth in the Notice of Appeal, namely whether or not ORS 111.070, the Oregon reciprocal inheritance rights statute, is repugnant to Article I, § 10, Article I, § 8 and/or the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and further whether said statute should

be declared invalid and given no effect because it conflicts with overriding federal law and policy, are closely akin and may be otherwise stated as follows:

a) May the State of Oregon, may any individual state of the Union, enact statutes restricting or taking away inheritance rights in estates within its borders from *some but not all* nonresident aliens, the application of such statute being dependent upon whether the officials and/or the courts of such state deem and find that the country of which said alien is a citizen or resident meets the terms and conditions laid down by the state for granting, restricting or denying rights of inheritance to nonresident aliens? Appellants think not and contend that any such regulation may be exercised only by the Federal Government.

b) Does not such legislation in effect and directly place each of such states in the position of sitting and passing in judgment upon the foreign nations whose nationals or residents are potential heirs, upon the laws, the forms of government, the ideologies, the foreign policies of such nations, and whether a particular foreign nation's posture is friendly towards or inimical to the United States and the interests of its people; and if so,

c) Does not such action of the individual state result in its direct, indeed flagrant invasion of the exclusive power of the Federal Government to regulate the foreign relations of the United States? Appellants think so and submit that by reason thereof the reciprocal inheritance rights statute of Oregon as well as similar

statutes of other states are repugnant to the pertinent provisions of the federal constitution, invalid and may not be given effect by the courts.

Consideration of these questions will necessitate re-examination by this Court of its decision in *Clark v. Allen*, 331 U.S. 503 (1947) in the light of national and international events and the judicial decisions by the state courts during the past twenty years or more—this for the reason that every effort to prevail upon the state courts to reconsider these questions has gone down before the bar of *Clark v. Allen*.

IV. Statement of the Case

The Facts

The facts of the case are simple and not in dispute. Pauline Schrader, a resident of Portland, Oregon, died there, intestate, on September 30, 1962. She was a widow, had and left no issue, she was a naturalized American citizen, and left an estate appraised at \$17,764.72 consisting of real property, that is her modest home appraised at \$4500 [later sold for \$2,250.00], the rest in savings and other personalty. As she had no relatives in Oregon, William J. Miller, an undertaker who conducted her funeral, was appointed administrator of her estate by the probate department of the Circuit Court of Multnomah County, Oregon. Subsequently it was determined and stipulated that her next of kin and heirs are the appellants, a brother, sister, two nephews and two nieces all residing at or near decedent's native town not far from Leipzig in the Soviet Zone of Germany.

Federal Questions Raised and Passed Upon in Courts Below

As explained under II(i) above the constitutional invalidity of the Oregon reciprocal inheritance rights statute was alleged in the heirs' (appellants') Reply set forth at page 8 of Appellants' Abstract of Record and Brief, the material portion reading as follows:

"In reply to paragraph III of said answer plaintiffs allege that Section 111.070, Oregon, Revised Statutes, is in violation of the existing policy of the United States of America and constitutes an unlawful and unauthorized attempt by the State of Oregon to invade the exclusive power of the Federal Government to regulate the foreign relations of the United States of America; that therefore said statute is invalid and should be given no effect by this Court."

The question was extensively argued in the written briefs and the oral arguments of counsel to the Circuit Court and passed upon by the trial judge in his oral opinion [Appendix p. 31] as follows:

"The contention that ORS 111.070 is in violation of the existing policy of the Government of the United States of America and constitutes an unlawful and unauthorized attempt by the State of Oregon to invade the exclusive power of the Federal Government to regulate the foreign relations and therefore is invalid and should be given no effect by this Court is without merit in view of the decision of the United States Supreme Court in the case of *Clark v. Allen*, 331 U.S. 503, 91 L. Ed. 1633. If the rules of law announced in that case should be changed because of changed conditions

in the world or for political reasons, the Congress or the Supreme Court of the United States should revise the laws, certainly not this Probate Court."

On appeal the question was argued under Proposition IV from pages 49 to 56 inclusive of Appellants' Abstract of Record and Brief, and in Appellant's Reply Brief at pages 18 to 22 inclusive. The Supreme Court of Oregon in its opinion filed March 23, 1966, passed upon the question as follows [82 Or. Adv. Sh. at 452, 412 P2d at 791 [Appendix p. 19].

"Plaintiffs argue, however, that even if the provision of Article IV of the treaty is inapplicable, the personal property may not be escheated pursuant to the Oregon statute because the statute is an unconstitutional attempt by the state to invade the exclusive power of the federal government to regulate the foreign relations of the United States. They contend that the statute violates Article I, Section 10 of the United States Constitution. They imply that the subject matter of the statute is within the treaty-making power of the federal government and is an area of legislation from which the states are excluded by virtue of Article VI of the Constitution. This argument was also put to bed by *Clark v. Allen*, supra. The court was there dealing with a California statute similar to ORS 111.070. It was argued that the statute was an unconstitutional 'extension of state power into the field of foreign affairs, which is exclusively reserved by the Constitution to the Federal Government.' 331 US at 516. The court held that a state statute governing the descent and distribution of property must give way only if there is a conflict with 'an overriding fed-

eral policy as where a treaty makes different or conflicting arrangements. *Hauenstein v. Lynham*, *supra*, 331 US at 517 (emphasis ours)."

The question was again raised and extensively argued as Assignment of Error No. VI in appellants' Petition for Rehearing and Brief at pages 20 to 22 inclusive, but the Supreme Court of Oregon did not again pass upon or mention the question in its opinion filed June 3, 1966, denying the Petition for Rehearing [82 Adv. Sh. 861, 415 P.2d 15, Appendix p. 24]. Mention of *Clark v. Allen*, *supra*, there, was in connection with another question not included in this appeal.

The federal question here presented, that is the questioned validity of the state statute [ORS 111.070] on the ground of its being repugnant to the Constitution, treaties or laws of the United States, has therefore been actively in this case at all times in the proceedings below and the decision was in favor of the state statute's validity, thus bringing this appeal squarely under 28 U.S.C. § 1257 (2).

V. Federal Questions Presented Are so Substantial as to Require Plenary Consideration by this Court

Appellants are aware that in *Clark v. Allen*, *supra*, this Court in 1947 [at 331 U.S. 517] rejected the objections there made to a very similar California reciprocity statute and declined to declare that statute unconstitutional. However this Court at that place also said:

"Rights of succession to property are determined by local law. See *Lyeth v. Hoey*, 305 U.S.

188, 193; *Irving Trust Co. v. Day*, 314 U.S. 556, 562. Those rights may be affected by an overriding federal policy, as where a treaty makes different or conflicting arrangements. *Hauenstein v. Lynhaw*, *supra*. Then the state policy must give way. Cf. *Hines v. Davidowitz*, 312 U.S. 52."

Even if it were granted, although by no means conceded, that, on the same grounds stated in *Clark*, Oregon's corresponding reciprocity statute would then, in 1947, have been upheld as likewise invulnerable to the attack there and here made of unconstitutionality because an attempted invasion of the exclusive federal power to regulate the foreign relations of the United States, appellants contend and will endeavor to demonstrate that the events of the last twenty years or so and conditions presently existing compel a reexamination of *Clark* and a different ruling in the case at bar. Even then, shortly after the end of World War II, the Attorney General of the United States in his brief in *Clark* [at p. 75] described the California statute as a "recurrent source of diplomatic friction." In *Nashville C. & St. L. Ry. v. Walters*, 294 U.S. 405, 415, this Court redeclared a rule well settled by its decisions that:

"A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied."

There has indeed been a radical change in conditions between 1947 and 1966, and the case at bar presents a vastly different set of facts than those in *Clark*.

Firstly, it should be pointed out that the Oregon statute, that is ORS 111.070, enacted in its present, here applicable form in 1951, while basically intended to cover the same field of reciprocal inheritance rights and to accomplish the same purposes as Section 259 of the California Probate Code, is far more demanding in its requirements and far more confiscatory in its effect than California's statute was in 1942 and is today. The California statute, for instance, did not contain, in fact has never contained, the requirement in subparagraph (1)(c) of ORS 111.070. This provides that even if the required reciprocal rights of inheritance exist and even if an American heir has the required right to receive payment within the United States of his inheritance from the foreign country, the alien heir would still be denied his inheritance—and it would be taken by the state as escheat, in the absence of some other "eligible" heir—unless he could prove to the satisfaction of the court that he would "receive the benefit, use or control" of his Oregon inheritance "without confiscation, in whole or in part, by the government" of his country. This, then, is a highly important difference between the statute before the Court in *Clark* and the statute before the Court here. It directly requires the Oregon court to receive and consider evidence of internal conditions in a foreign country and to sit in judgment on that foreign country's government, its laws, its policies, its ideology, on the integrity and credibility of its officials, including those of the highest rank.

Precisely this happened, for example, in *State Land Board of Oregon v. Pekarek*, 234 Or. 74, 378 P.2d 734

(1963), where the Supreme Court of Oregon affirmed the escheat of an estate consisting of a savings account in a Portland, Oregon, bank, left by a citizen and resident of Czechoslovakia who had accumulated the money while in this country and left it in the Oregon bank for years after he had returned to his home and family in the old country, where, eventually, he died. The court pointed out that Czechoslovakia was listed in the Treasury Department Circular No. 655 [issued under 31 CFR § 211.3(a)] among the foreign countries to which U. S. Treasurer's checks or warrants could not be sent, and held that [234 Or. at 82]:

"This official determination was operative at the date of decedent's death. We regard this official declaration as evidence that foreign beneficiaries would not receive their interests free from control amounting to, at least, a partial confiscation."

although that federal regulation pertained only to United States government, not private funds such as inheritances, against the transmission of which no prohibitions or restrictions existed. The court's opinion of Czechoslovak officials, including that country's ambassador to the United States, whose certificate giving assurance that full reciprocity and rights existed as required by the Oregon statute, was received in evidence [p. 80], is stated at p. 83 as follows:

"The statements of Czechoslovakian officials must be judged in the light of the interest which they had in the acquisition of funds for their government. Moreover, in judging the credibility of these witnesses we are entitled to take into consideration the fact that declarations of government of-

officials in communist-controlled countries as to the state of affairs existing within their borders do not always comport with the actual facts."

Similar, and indeed much stronger criticism, some approaching the slanderous, of certain foreign governments and their officials may be found in numerous other decisions where reciprocal inheritance rights and similar statutes were involved, for example:

State Land Board v. Kolovrat, 220 Or. 448, 349 P.2d 255 (1960) reversed on ground treaty applicable in *Kolovrat v. Oregon*, 366 U.S. 187 (1961). (See 220 Or. at 460-1).

Arbulich's Estate, 41 Cal. 2d 86, 257 P.2d 433 (1953) (Quotation and criticism of the trial judge's extremely biased statements at 257 P.2d 447, 448.)

Stoian's Estate, 128 Mont. 52, 269 P.2d 1085 (1954) (The dissenting opinion at 269 P.2d 1090).

Spoya's Estate, 129 Mont. 83, 282 P.2d 456 (1955) (The dissenting opinion and the apology of the majority for the intemperate remarks therein at 282 P.2d 548).

Hosova's Estate, 143 Mont. 74, 387 P.2d 305 (1963) (The dissenting opinions at 387 P.2d 311).

Belemecich's Estate, Consul General of Yugoslavia at Pittsburgh v. Pennsylvania, 411 Pa. 506, 192 A.2d 740 (1963) 375 U.S. 395, Certiorari granted, judgment reversed (1964) (192 A.2d 741-3).

It is a certainty that such harsh, intemperate, derisive, defamatory, even contemptuous statements from highly

placed members of the American judiciary do not go unnoticed in the chancellories of the nations involved. That they must be a source of the deepest embarrassment to the State Department, and add gravely to its conduct of the relations with those countries, cannot for a moment be doubted.

Since World War II and *Clark v. Allen*, numerous other states throughout the country have adopted statutes similar to the Oregon statute which learned students of the subject have called the "Western" or "confiscatory" type because they originated in the west, in fact Oregon led the field with Chapter 399, Oregon Laws 1937, which became § 61-107, O.C.L.A. and was replaced in 1951 with ORS 111.070. Soon thereafter, in 1939, Montana adopted § 91.520, R.C.M. 1947, California in 1941 adopted § 259 of the Probate Code, and Iowa in 1951 adopted the provisions of the then California statute as its § 567.8, Iowa Code Annotated. In 1963 Nebraska adopted most of Oregon's 111.070 with certain ramifications. [Neb. Laws 1963, c. 21 § 1, p. 104, § 4-107, R. S. Supp. 1965]. All contain provisions for escheating the alien heir's inheritance if his country does not meet the conditions laid down in the statute and no other, "eligible" heir exists and claims (except in Montana where escheat occurs regardless of the existence of an "eligible" heir).

In the eastern part of the country the trend was towards the so-called "Eastern" or "withholding" statutes such as § 269a of the New York Surrogate's Act, and Pennsylvania's Act of July 28, 1953, P. L. 674,

which the Pennsylvania Supreme Court in *Belemecich, supra*, said: [192 A.2d at 741]:

"... carries the sobriquet of 'Iron Curtain Act' because its purpose is to protect the moneys, physically in America, but belonging to people who fatefully find themselves behind the Iron Curtain of Communism."

New Jersey, Massachusetts, Connecticut and other eastern states have similar statutes designed to authorize the courts to withhold actual distribution and transmission of a foreign heir's or legatee's inheritance in the absence of proof that he would have the full use and benefit thereof. These statutes have, of course, as in the states with the "Western" type statutes, necessarily led courts to inquire into, and to sit in judgment upon the particular foreign country's government, its laws, its policies, its ideology, the integrity and credibility of its officials, etc.

Space does not permit further extension of this discussion but reference is respectfully made to the learned and exhaustive treatise "The Invalidity of State Statutes Governing the Share of Nonresident Aliens in Decedents' Estates" by Professor Willard L. Boyd of the College of Law, University of Iowa, in Vol. 51, The Georgetown Law Journal 470 (1963). It appears to have been motivated by this Court's dismissal of the appeal, for want of a substantial federal question, in *Ioannou v. New York*, and the dissent of Mr. Justice Douglas, with whom Mr. Justice Black concurred, 371 U.S. 30. In recent years much literature has accumu-

lated on the subject. Of particular interest are Comment in Vol. 1963, Duke Law Journal 315, entitled "State Reciprocity Statutes and the Inheritance Rights of Nonresident Aliens," and, most recently, under Note and Comment in Vol. 45, Number 3 of the Oregon Law Review 221 (April 1966); a treatise entitled "International Law—Inheritance by Nonresident Aliens in Oregon; The Oregon Statute, the Effect of Treaties, and the Federal Law." Therein the decision of the Supreme Court of Oregon in the Schrader estate, which is the subject of this appeal, is severely criticized.

It is deemed pertinent to point out the radical differences between the case at bar and *Ioannou v. New York*, *supra*, in which the appeal was dismissed. Most importantly, there was before the Court in *Ioannou* the mild, non-confiscatory New York withholding statute, that is § 269a of the New York Surrogate's Court Act. There, as Mr. Justice Douglas pointed out, even such a modest "restraint" as prohibiting a Czechoslovak heir from assigning her New York inheritance to a niece in England as a gift might "... affect international relations in a persistent and subtle way." [371 U.S. 32]. Yet such an effect is as nothing compared to the effect on the relations with a country whose people are denied their rights of inheritance and whose inheritances are escheated, in plain language confiscated, by an American state. And not infrequently the injury has been accompanied by insult. In *Ioannou* the heir has not had her inheritance taken away by the statute, although that, as far as she is concerned, may be the end-result if she should die before, if ever, a future surro-

gate decides she may have it. In the case at bar the deprivation is complete, absolute, final.

It is a matter of common knowledge that in the countries of the civilized world, with the United States perhaps the only exception, inheritance laws are national in scope and are uniform throughout the country. The governments, and the people, of these countries cannot understand and cannot rationalize why from some American state inheritances flow without restriction, while other American states may seize away, or in the least withhold transmission of inheritances. In international affairs every action has a reaction. So far the reaction has not crystallized, but no one can deny that international relations have suffered and the whole nation will eventually be held to account.

A Great Urgency Exists

The countries most grievously affected are those countries of Europe from where most of the mass migrations came to the United States in the late 1800's and the early 1900's. It is the men and women who came in these mass migrations during the twenty years or so before the outbreak of World War I in August 1914 who are now dying off at an ever-increasing rate and whose desire, by testacy or intestate succession, is to benefit their loved ones back home, most of them in modest or needy circumstances. It is their desires that are being thwarted in many instances by the so-called Western, confiscatory reciprocity statutes and even by the milder so-called Eastern withholding statutes.

If anything is to be done, it must be done quickly. Vast irremedial damage has already been done, literally hundreds of estates are pending in the probate courts of this country in which there are heirs or beneficiaries in the affected countries. Their assets are substantial, undoubtedly aggregating into the millions, and every day new cases arise. Many estates pending in the "reciprocity" and "withholding" states are being held in abeyance awaiting the outcome of this most recent effort to seek invalidation of these statutes, specifically of course of ORS 111.070, with which similar statutes of the other states would presumably stand or fall.

Questions of Great Public Importance Presented

This case does indeed present questions of great public as well as individual importance so substantial as to require plenary consideration by this court, with briefs on the merits and oral argument, for their resolution. The holding of this Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) seems to point the way. As the act of state doctrine was there held to be a matter of federal law, not subject to interpretation and application by the individual states, so if there is to be differentiation, discrimination if you please, between aliens of different nationalities, if one nonresident alien is to be permitted to inherit in the United States, another not because of the failure of his country to meet certain standards or requirements, this should and must be governed and determined by federal law uniformly effective throughout the nation.

The foreign relations of the United States are, be-

yond any shadow of doubt, being affected, seriously and adversely, by ORS 111.070 and by the interpretations and application thereof by the courts of the State of Oregon. If it was a valid statute when enacted, which is by no means conceded, it has become invalid under the present, different set of facts and by change in the conditions to which it is applied (*Nashville C. & St. L. Ry. v. Walters, supra*).

It may be presumed that legislators of other states, ever on the lookout for new sources of revenue, will be tempted to emulate the action of Oregon, of California, Montana, Iowa, etc., in seizing by escheat the inheritances of some nonresident aliens whose countries will not or cannot meet the particular state's conditions. There is a certain popular appeal in the "Iron Curtain" rule. It would serve to avoid much painful and costly litigation if this Court would, as is here prayed for, declare that such legislation is in a field of exclusive federal competence upon which the individual states may not encroach.

As recently as August 2, 1966, the California Supreme Court in *Estates of Larkin and Terry*, 65 A.C. 49, 52 Cal. Rptr. 441, ruling for reciprocity with the U.S.S.R. [but see *Estate of Gogashbashvele*, 195 Cal. App. 2d 503, 16 Cal. Rptr. 77 (1961) holding against reciprocity with the U.S.S.R.], refused to consider the constitutional validity of the California reciprocity statute, deeming that question to have been settled by *Clark v. Allen, supra*. However, the court did make the following most cogent comment [52 Cal. Rptr. at 456-7]:

"The commentators have seriously criticized the reasoning of the *Clark* decision. One writer declares that the court 'grossly underestimate[d] the effect of the California statute on foreign relations' and that the decision is inconsistent with prior and subsequent court rulings. (Boyd, *The Invalidity of State Statutes Governing the Share of Nonresident Aliens in Decedents' Estates* (1963) 51 Geo.L.J. 470, 493-500; cf. Hawley, *Succession*, 1964 Annual Survey of American Law 585, 591.)

"Similarly, Justice Douglas, himself the author of *Clark* has declared that he believes the time has come to reconsider the rationale of that decision in light of the 'notorious' practice of certain state courts 'in withholding remittances to legatees residing in Communist countries' and thus affecting the foreign relations of this country in a manner not justified by any legitimate state interest in regulating the local aspects of inheritance. (*Ioannou v. New York* (1962) 371 U.S. 30, 83 S. Ct. 6, 9 L. Ed. 2d 5, per curiam dismissal of appeal, Justices Douglas and Black voting to note jurisdiction, opinion by Justice Douglas.) Whatever the present status of the *Clark* decision, the construction of section 259 for which the Attorney General contends in the present case goes well beyond that deemed 'farfetched' in *Clark*."

And still more recently, on September 7, 1966, the California District Court of Appeal in the *Estate of Magdalena Chichernea*, 244 A.C.A. 727, 53 Cal. Rptr. 535, rehearing denied 9/26/66, ruling *against* reciprocity with Rumania [but see *Estate of Kennedy*, 106 Cal. App. 2d 621, 235 P.2d 837 (1951) holding *for* reciprocity with

Rumania] likewise refused to reconsider the constitutional validity of the California reciprocity statute, saying [53 Cal. Rptr. at 540]:

"Petitioners contend that Probate Code, § 259 is unconstitutional in that it denies to them the equal protection of the laws and due process under the Fourteenth Amendment of the United States Constitution and that it constitutes an unwarranted infringement on the powers of the Federal Government in the area of foreign relations. In *Clark v. Allen*, 331 U.S. 503, 517, 67 S. Ct. 1431, 91 L. Ed. 1633; *Estate of Knutzen*, 31 Cal. 2d 573, 191 P.2d 747; *Estate of Bevilacqua*, 31 Cal. 2d 580, 582, 191 P.2d 752, these arguments are analyzed and rejected. We agree with these cases."

It is clear therefore that unless and until this Court reexamines *Clark v. Allen* and holds that the ruling therein, made in 1947, is no longer valid in view of the changed conditions and what has happened in the world during the past two decades, the state courts will not, and perhaps could not, invalidate these reciprocity and withholding statutes. As stated by Mr. Justice Douglas in *Ioannou, supra* [371 U.S. at 33]:

"The question seems substantial and does not seem to be foreclosed by *Clark v. Allen*, 331 U.S. 503."

VI. CONCLUSION

Appellants submit that they have shown that substantial federal questions are presented in this case, indeed questions of vast national and international importance most seriously affecting the foreign relations

of the United States. When state laws or state policies affect the foreign relations of the country and thus adversely affect the nation as a whole, the state must yield and a state statute having that result must be invalidated and given no effect.

Appellants pray that jurisdiction by this Court be noted and this case set for plenary consideration.

Respectfully submitted,

PETER A. SCHWABE, SR.

PETER A. SCHWABE, JR.

Attorneys for Appellants.

APPENDIX

OPINION OF THE SUPREME COURT OF OREGON
Department 2.

IN THE MATTER OF THE ESTATE OF
PAULINE SCHRADER, DECEASED.

ZSCHERNIG, ET AL, *Appellants*, v. MILLER, ET AL,
Respondents.

Argued and submitted February 3, 1966; decided
March 23, 1966.

MODIFIED AND REMANDED WITH DIRECTIONS.
HOLMAN, J.

Pauline Schrader, a resident of Oregon, died intestate on September 30, 1962. She left an estate comprised of both real and personal property. Her next of kin were a brother and sister, two nieces and two nephews, all of whom are nonresident aliens residing in the Soviet-occupied zone of Germany, hereinafter referred to as East Germany.¹ These relatives, as plaintiffs, brought a proceeding for a determination of heirship in their favor. This was contested by the State of Oregon, through its State Land Board, which requested that the property be escheated to the state.

ORS 111.070² provides that the right of nonresident

¹ By referring to this area as "East Germany" we do not pass judgment on the political question whether Germany is a divided state or country with more than one government.

² ORS 111.070 states as follows:

"(1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or

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aliens to take property from Oregon estates is dependent upon (1) the reciprocal right of the citizens of the United States similarly to take property from estates in the country of which the alien is an inhabitant or citizen; (2) the right of citizens of the United States to receive in this country money originating from states in such foreign country; and (3) proof that such aliens will receive the benefit of money or property from estates in this state without confiscation in whole or in part by such foreign country. The statute further provides that if these three prerequisites are not found to exist and there are no other heirs, the property will escheat to the State of Oregon. *State Land Board v. Pekarek*, 234 Or 74, 76-79, 378 P2d 735 (1963).

The trial court found that the evidence did not es-

testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:

"(a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such an alien is an inhabitant or citizen;

"(b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and

"(c) Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.

"(2) The burden is upon such nonresident alien to establish the fact of existence of the reciprocal rights set forth in subsection (1) of this section.

"(3) If such reciprocal rights are not found to exist and if no heir, devisee or legatee other than such alien is found eligible to take such property, the property shall be disposed of as escheated property."

tablish the existence of reciprocal rights to take property from or to receive the proceeds of East German estates at the date of decedent's death, that ORS 111.070 was valid and controlling, and that the proceeds of the estate escheated to the State of Oregon. Plaintiffs appealed.

Plaintiffs refer this court to Article IX, paragraph 3 of the Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, October 29, 1954, 7 U.S.T. & O.I.A. 1839, TIAS No. 3593 (effective July 14, 1956), hereinafter referred to as the 1954 Treaty, which was negotiated by the United States with the government having jurisdiction over that territory known popularly as West Germany. They contend that it extends to them, as East German residents, reciprocal rights of inheritance.

Article IX, paragraph 3, of the 1954 Treaty provides as follows:

"Nationals and companies of either Party shall be accorded national treatment, within the territories of the other Party, with respect to acquiring property of all kinds by testate or intestate succession or under judicial sale to satisfy valid claims. Should they because of their alienage be ineligible to continue to own any such property, they shall be allowed a period of at least five years in which to dispose of it."

"National treatment" is defined by Article XXV, paragraph 1:

"The term 'national treatment' means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded

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therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party."

This raises the question whether East German residents are entitled to the benefits of the treaty. Plaintiffs contend that all citizens of Germany, East and West, are encompassed by the terms of the treaty because the state of Germany and its nationals continue to exist despite Germany's defeat and occupation by the allied forces. This argument is founded on Art. 116(1) of the Constitution of Germany. 2 Peaslee, *Constitutions of Nations* 53 (2d ed, 2d printing 1956). It is also based upon the international law doctrine concerning state succession. 2 Whiteman, *Digest of International Law* 754-761, 787-799 (1963). The plaintiffs correctly contend that the West German government is the only legally constituted government of the state of Germany recognized by the United States. 2 Whiteman, *supra* at 794-795. From this line of reasoning they deduce that the 1954 Treaty entered into with the United States by the West German government was for the benefit of all Germans.

Courts of law are required to interpret treaties as any other contract by giving effect to the intent of the parties as manifested by the terms thereof. *Sullivan v. Kidd*, 254 US 433, 439, 41 S Ct 158, 65 L Ed 344 (1921); *Maximov v. United States*, 373 US 49, 54, 83 S Ct 1054, 10 L Ed 2d 184 (1963); Restatement (Second), Foreign Relations § 146 (1965). Article IX, paragraph 3 of the 1954 Treaty accords "national treatment, within

the territories of the other Party." The "territories" referred to are delineated by Article XXVI of the treaty, which provides, in part:

"1. The territories to which the present Treaty extends shall comprise all areas of land and water under the sovereignty of authority of each Party, other than the Panama Canal Zone and the Trust Territory of the Pacific Islands.

"2. The present Treaty shall also apply * * * to Land Berlin which for the purposes of the present Treaty comprises those areas over which the Berlin Senate exercises jurisdiction."

This language seems to say that the 1954 Treaty was meant to apply only to that geographic area of Germany over which the government of West Germany exercises its jurisdiction.

In the interpretation of treaties, "the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight," *Kolovrat v. Oregon*, 366 US 187, 194, 81 S Ct 922, 6 L Ed 2d 218 (1961); *Sullivan v. Kidd*, supra at 442. This does not mean, however, that courts are necessarily bound by the interpretation of the executive branch. Restatement (Second), Foreign Relations § 152 (1965). The State Department of the United States has declared the position of our government with respect to Article XXVI of the 1954 Treaty as follows:

"Pursuant to that provision in Article XXVI, therefore, the treaty applies with respect to all territory under United States jurisdiction other than that specifically excluded and to all territory under

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the sovereignty or authority of the Federal Republic of Germany. Consequently, the 1954 treaty does not apply with respect to the territory commonly referred to as East Germany." Letter of February 13, 1964, from Ely Maurer, Assistant Legal Adviser for European Affairs, to Attorney General of Oregon Robert Y. Thornton.

To the contrary, however, the position of the West German government, as contained in a Foreign Office certificate issued at Bonn on September 30, 1963, and introduced into evidence, is as follows:

"It is the position of the Government of the Federal Republic of Germany that the rights granted by Article IX, Paragraph 3 of the Treaty of Friendship, Commerce and Navigation * * * are due and accorded to all German citizens. A citizenship of the Federal Republic of Germany as distinct from a citizenship of the Soviet occupied zone which might possibly give rise to a different application of Article IX, Paragraph 3 of the said treaty does not exist."

It is the belief of this court that neither German citizenship nor nationality has real bearing on this issue because territorial application of the 1954 Treaty, by the terms of Article XXVI, is governed by sovereignty. The West German government has no sovereign authority over that geographical area known as East Germany. The interpretation of the State Department of the United States seems to us to be the only reasonable interpretation of the language of Article XXVI. We believe it was not the intent of the United States and West Germany, at the time of making the

1954 Treaty, to extend its provisions to residents of East Germany.

The situation here differs from those prevailing in the cases of *Estate of Nepogodin*, 134 Cal App 2d 161, 185 P2d 672 (1955), and *Mullart v. State Land Board*, 222 Or 463, 353 P2d 531 (1960), relied upon by plaintiffs. In those cases the relevant treaties applied to the country or state as a whole. In this case, however, the 1954 Treaty specifically provides that its geographic application is to an area less than the state of Germany as a whole and excludes the area in which plaintiffs live.

Plaintiffs contend that if the 1954 Treaty is inapplicable Articles IV and XXV of the Treaty of Friendship, Commerce and Consular Rights with Germany, December 8, 1923, 44 Stat 2132, T.S. No. 725 (effective October 14, 1925) amended June 3, 1935, 49 Stat 3258, T.S. No. 897, hereinafter referred to as the 1923 Treaty, are applicable.

The state of Oregon contends that the 1923 Treaty has been abrogated by virtue of subsequent events. Article XXVIII of the 1954 Treaty with the West German government provides as follows:

"The present Treaty shall replace and terminate provisions in force in Articles I through V * * * of the treaty of friendship, commerce and consular rights between the United States of America and Germany, signed at Washington December 8, 1923 * * *."

The 1954 Treaty thus purports to abrogate Article IV of the 1923 Treaty dealing with the rights of indi-

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viduals to take property. However, the 1954 Treaty, as previously pointed out, explicitly extends only to those areas over which West Germany has sovereignty. This does not include East Germany. Its provisions would therefore not affect the application of the 1923 Treaty to East Germany. This conclusion has also been reached by the United States State Department. The Department has said:

"* * * Since the Federal Republic of Germany was the Party to the 1954 Treaty the provisions of that Treaty apply solely with regard to the area of the Federal Republic of Germany. Consequently, the 1954 Treaty does not apply with respect to that part of Germany outside the Federal Republic of Germany commonly referred to as East Germany, and Article XXVIII of the 1954 Treaty does not apply with regard to East Germany. As far as East Germany is concerned, Article IV of the 1923 Treaty has not been replaced through the operation of Article XXVIII of the 1954 Treaty." Letter of February 24, 1964, from Ely Maurer, Assistant Legal Adviser for European Affairs, to Attorney General of Oregon Robert Y. Thornton.

Since the enactment of the 1923 Treaty, World War II has ensued, Germany has been defeated and occupied, and the Soviet government has created a regime in East Germany which is not recognized by the United States as a legal government. The United States government still treats East Germany as Soviet-occupied territory of Germany. No treaty of peace has ever been consummated.³ What then is the status of the 1923

³ No peace treaty has been signed by all the belligerents to

Treaty as it relates to East Germany?

In considering whether the many changes in Germany's status would abrogate the treaty, the case of *Clark v. Allen*, 331 US 503, 67 S Ct 1431, 91 L Ed 1633 (1947), must be considered. In that case the decedent died in 1942 a resident of California leaving real and personal property there. She bequeathed her entire estate to four relatives who were nationals and residents of Germany. The Alien Property Custodian instituted an action against the executor of the estate and California heirs-at-law to determine that the California heirs-at-law had no interest in the estate and that he was entitled to the entire estate as the representative of the German nationals. The heirs-at-law claimed the German nationals were ineligible as legatees because a reciprocity requirement of California law similar to that of Oregon could not be satisfied.

The court there held that the 1923 Treaty between the United States and Germany was not entirely abrogated by the outbreak of World War II and the enactment of the Trading with the Enemy Act. It held that the treaty provisions regarding descent and distribution of property were still in effect. The court said as follows:

World War II. See 1 Whiteman, Digest of International Law, 331-336 (1963). In substitution therefor, the United States, Great Britain, France, and West Germany entered into a Protocol concerning Termination of the Occupation Regime in the Federal Republic of Germany, October 23, 1954, 6 U.S.T. & O.I.A. 4117, TIAS No. 3425 (effective May 5, 1955) containing a Convention on Relations Between the Three Powers and the Federal Republic of Germany, 6 U.S.T. & O.I.A. at 4251, by which the occupying nations revoked the occupied status of Germany and retained limited rights pending reunification of Germany and a peace settlement.

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"We start from the premise that the outbreak of war does not necessarily suspend or abrogate treaty provisions. *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 494-495. There may of course be such an incompatibility between a particular treaty provision and the maintenance of a state of war as to make clear that it should not be enforced. *Karnuth v. United States*, 179 U.S. 231. Or the Chief Executive or the Congress may have formulated a national policy quite inconsistent with the enforcement of a treaty in whole or in part. This was the view stated in *Techt v. Hughes*, *supra*, and we believe it to be the correct one. * * *" 333 US 508-509.

In *Techt v. Hughes*, 229 NY 222, 128 NE 185, cert. denied 254 US 643 (1920), Cardozo, J., stated:

"* * * The question is not what states may do after war has supervened, and this without breach of their duty as members of the society of nations. The question is what courts are to presume that they have done. * * * President and senate may denounce the treaty, and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts (*Fong Yue Ting v. U.S.*, 149 U.S. 698). The treaty of peace itself may set up new relations, and terminate earlier compacts either tacitly or expressly. * * * But until some one of these things is done, until some one of these events occurs, while war is still flagrant, and the will of the political departments of the government unrevealed, the courts, as I view their function, play a humbler and more cautious part. It is not for them to denounce treaties generally, *en bloc*. Their part it is, as one provision or another

is involved in some actual controversy before them, to determine whether, alone, or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace. The mere fact that other portions of the treaty are suspended or even abrogated is not conclusive. The treaty does not fall in its entirety unless it has the character of an indivisible act." 229 NY at 243, 128 NE at 192.

Concerning the continued applicability of the 1923 Treaty, Mr. Justice Douglas said, in *Clark v. Allen*, *supra* at 513-514:

"* * * We have no reliable evidence of the intention of the high contracting parties outside the words of the present treaty. The attitude and conduct under earlier treaties, reflecting as they did numerous contingencies and conditions, leave no sure guide to the construction of the present treaty. Where the relevant historical sources and the instrument itself gave no plain indication that it is to become inoperative in whole or in part on the outbreak of war, we are left to determine, as *Techt v. Hughes*, *supra*, indicates, whether the provision under which rights are asserted is incompatible with national policy in time of war. So far as the right of inheritance of realty under Article IV of the present treaty is concerned, we find no incompatibility with national policy, for reasons already given."

What of the effect of the events subsequent to the termination of World War II? Is the provision of the

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treaty under which the right to inherit is asserted incompatible with present national policy? At the time *Clark v. Allen*, supra, was decided the war was over and Germany had been occupied by the Allies. The court said as follows:

"It is argued, however, that the Treaty of 1923 with Germany must be held to have failed to survive the war, since Germany, as a result of its defeat and the occupation by the Allies, has ceased to exist as an independent national or international community. *But the question whether a state is in a position to perform its treaty obligations is essentially a political question.* *Terlinden v. Ames*, 184 U.S. 270, 288. We find no evidence that the political departments have considered the collapse and surrender of Germany as putting an end to such provisions of the treaty as survived the outbreak of the war or the obligation of either party in respect to them. * * *" 331 US at 514 (emphasis ours).

The world political situation has vastly changed in the nearly twenty years since the decision in *Clark v. Allen*, supra. As previously pointed out, the Soviet government has purported to turn over power in East Germany to a regime which is not recognized by the United States. However, the executive branch of the United States government, which is charged with the negotiation and interpretation of treaties, has recently indicated publicly its attitude concerning the continued effectiveness of Article IV of the 1923 Treaty and its application to East Germany. A document published by the Treaty Affairs Staff, Office of the Legal Adviser, United States State Department dated September 30, 1965, entitled "Treaty

Provisions Relating to the Rights of Inheritance and Acquisition and Ownership of Property in Force between the United States and Other Countries," states at page 19, note 3, as follows:

"[The 1954] Treaty is applicable to the area of Germany constituting the Federal Republic and Land Berlin. It appears that Article IV of the treaty of friendship, commerce, and consular rights between the United States and Germany signed on December 8, 1923 (44 Stat. 2132), which contains provisions relating to rights of inheritance of and succession to property, continues in force with respect to areas of Germany not presently included in the territory of the Federal Republic and Land Berlin. The entry into force of the 1954 treaty between the United States and the Federal Republic, which replaced and terminated Article IV of the 1923 treaty with respect to the area of Germany constituting the Federal Republic and Land Berlin, had no effect on the 1923 treaty with respect to the area of Germany not included in the Federal Republic and Land Berlin. * * *"

This indicates that the United States government still considers Article IV of the 1923 Treaty in effect with relation to East Germany. While that attitude of the United States government is not binding upon this court in an adjudication of title to private property, *Clark v. Allen*, supra at 517, the State Department document is entitled to great weight. *Kolovrat v. Oregon*, supra at 194; *Sullivan v. Kidd*, supra at 442. This is particularly true in view of the fact that whether that part of Germany known as East Germany is in a position to perform its treaty obligations is essen-

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tially a political question. In the case of *Estate of Nepogodin* 134 Cal App 2d 161, 285 P2d 672 (1955), the court considered whether communist control of Manchuria, the part of China where decedent's heirs resided, was such as to invalidate a treaty with Nationalist China which was used as evidence of reciprocal rights of inheritance. The court there said, at page 170:

"* * * The ratification exchange shows that the United States Government did not then consider the conditions existing in China an unsurmountable obstacle to the effectiveness of the Treaty. It had not denounced the Treaty at the date of decedent's death. As to the ability of a foreign state to perform its treaty obligations and as to the question whether a treaty has been terminated the action of the political departments of our government is controlling. (*Clark v. Allen*, 331 U.S. 503, 514 [67 S. Ct. 1431, 91 L.Ed. 1633, 170 A.L.R. 953]; *Terlinden v. Ames*, 184 U.S. 270, 285, 288 [22 S.Ct. 484, 46 L.Ed. 534].) * * *"

In *Terlinden v. Ames*, 184 US 270, 277-278, 22 S Ct 484, 46 L Ed 534, the court said:

"* * * Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture. 1 Kent, Com. 174. * * *

"We concur in the view that the question

whether power remains in a foreign state to carry out its treaty obligations is in its nature political and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard."

Terlinden v. Ames, *Clark v. Allen*, and *Estate of Nepogodin* all say that the ability of a foreign country to comply with its treaty obligations is essentially a political question. In view of these cases and the present attitude of the State Department, we apply the principle of judicial abstention to the question of whether a foreign state is able to carry out its treaty obligations and therefore whether the United States is still bound.⁴ The political department of the federal government particularly charged with the negotiation and enforcement of the treaty in question has determined that the United States is still obligated. We therefore hold Articles IV and XXV of the 1923 Treaty to be still in effect as they apply to the territory of East Germany.

Plaintiffs contend that the provisions of ORS 111.070 are in conflict with Articles IV and XXV of the 1923 Treaty and that the statute must yield to the terms of

⁴ Restatement (Second), Foreign Relations § 152, comment c; Reporters' Note (1965) states:

"The 'political question' doctrine as it relates to interpretation of international agreements. The principle of judicial abstention has been applied to, among others, the following types of questions arising in litigation involving international agreements:

"(c) Whether a foreign state still has power to carry out its treaty obligations and whether the United States is therefore still bound. *Terlinden v. Ames*, 184 U.S. 270 (1902); *Charlton v. Kelly*, 229 U.S. 447 (1913); *Clark v. Allen*, 331 U.S. 503 (1947)."

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the treaty. In so far as Article IV provides for the reciprocal taking of property by the nationals of one country from decedents' estates in the other upon the same conditions as citizens of such other state, it is in conformance with the reciprocal provisions of ORS 111.070 (1) (a). However, the statute in (1)(b) and (c) establishes two additional prerequisites to the vesting or taking by alien nationals of property from Oregon estates, neither of which is demanded by the treaty. These requirements are (1)(b) that citizens of the United States be able to receive payment here of money originating from estates in the foreign country and (1)(c) that beneficiaries of Oregon estates residing in such foreign country be able to receive there, without confiscation, money originating from such estates. Decedent's foreign relatives have not shown that subsections (1)(b) and (c) can be complied with as required by ORS 111.070 (2). They do not even contend that the requirements of (1)(b) can be met. However, these additional prerequisites to vesting are in contravention of the rights granted by the terms of the treaty.

A state statute in contravention of a treaty between the United States and a foreign government must yield to that treaty. *State Land Board v. Kolovrat*, 220 Or 448, 462, 349 P2d 255 (1960) rev'd on other grounds; *Kolovrat v. Oregon*, 366 US 187, 190, 81 S Ct 922, 6 L Ed 2d 218 (1961); *Clark v. Allen*, supra at 508, 517; *Hauenstein v. Lynham*, 100 US 483, 488- 490, 25 L Ed 628 (1880); *Ware v. Hylton*, 3 US [3 Dall] 199, 236, 1 L Ed 568 (1796). Therefore, the requirements of ORS

111.070 (1)(b) and (c) must yield to the treaty where the treaty applies.

Having held the 1923 Treaty still in effect as to that territory of Germany known as East Germany and the provisions of ORS 111.070 (1)(b) and (c) of no effect when in conflict therewith, we must now turn to the specific provisions of the treaty for the purpose of determining whether they grant plaintiffs the right to inherit decedent's property. Article IV of the treaty provides as follows:

"Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference * * *.

"Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees, and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same

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at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases."

This is the same article of the same treaty which was construed in *Clark v. Allen*, *supra*; so we again turn to that case for the construction of its terms. The court said, in reference to the second paragraph of Article IV concerning personal property, as follows:

"A practically identical provision of the Treaty of 1844 with Wurttemberg [sic], Art. III, 8 Stat. 588, was before the Court in *Frederickson v. Louisiana*, 23 How. 445. In that case the testator was a citizen of the United States, his legatees being citizens and residents of Wurttemberg. Louisiana, where the testator was domiciled, levied a succession tax of 10 per cent on legatees not domiciled in the United States. The Court held that the treaty did not cover the 'case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other' pp. 447-448. That decision was made in 1860. In 1917 the Court followed it in cases involving three other treaties. *Peterson v. Iowa*, 245 U.S. 170; *Duus v. Brown*, 245 U.S. 176; *Skarderud v. Tax Commission*, 245 U.S. 633.

"The construction adopted by those cases is, to say the least, permissible when the syntax of the sentences dealing with realty and personalty is considered. So far as realty is concerned, the testator includes 'any person'; and the property covered is that within the territory of either of the high

contracting parties. In case of personality [sic], the provision governs the right of 'nationals' of either contracting party to dispose of their property *within the territory of the 'other' contracting party*; and it is 'such personal property' that the 'heirs, legatees and donees' are entitled to take." 331 US 515 (emphasis ours).

This is dispositive of any contention of the plaintiffs in this case that the 1923 Treaty is applicable to the personal property of decedent. The treaty does not cover personal property located in this country which an American national undertakes to leave to German nationals.⁵ Not being applicable, there can be no conflict between its terms and ORS 111.070 regarding disposition of decedent's personal property. ORS 111.070 controls and decedent's German relatives have not made the showing necessary to bring them within its terms.

Plaintiffs argue, however, that even if the provision of Article IV of the treaty is inapplicable, the personal property may not be escheated pursuant to the Oregon statute because the statute is an unconstitutional attempt by the state to invade the exclusive power of the federal government to regulate the foreign relations of the United States. They contend that the statute violates Article I, Section 10 of the United States Constitution. They imply that the subject matter of the statute

⁵ In *Clark v. Allen*, as here, there was no showing as to the nationality of decedent. We are presuming, in the absence of a showing to the contrary, as the United States Supreme Court did in that case (331 U.S. at 516), that decedent was a national of the United States, her country of residence at the time of her death.

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is within the treaty-making power of the federal government and is an area of legislation from which the states are excluded by virtue of Article VI of the Constitution. This argument was also put to bed by *Clark v. Allen*, supra. The court was there dealing with a California statute similar to ORS 111.070. It was argued that the statute was an unconstitutional "extension of state power into the field of foreign affairs, which is exclusively reserved by the Constitution to the Federal Government." 331 US at 516. The court held that a state statute governing the descent and distribution of property must give way only if there is a conflict with "an overriding federal policy as where a treaty makes different or conflicting arrangements. *Hauenstein v. Lynham*, supra." 331 US at 517 (emphasis ours).

We now turn to the first paragraph of Article IV of the 1923 Treaty which pertains to real property. We again quote from *Clark v. Allen*, which states in regard to this paragraph as follows:

"The rights secured are in terms a right to sell within a specified time plus a right to withdraw the proceeds and an exemption from discriminatory taxation. It is plain that those rights extend to the German heirs of 'any person' holding realty in the United States. And though they are not expressed in terms of ownership or the right to inherit, that is their import and meaning. *Techt v. Hughes*, 229 N.Y. 222, 240, 128 N.E. 185, 191; *Ahrens v. Ahrens*, 144 Iowa 486, 489, 123 N.W. 164, 166. And see *People v. Gerke*, 5 Cal. 381; *Scharpf v. Schmidt*, 172 Ill. 255, 50 N.E. 182; *Colson v. Carlson*, 116 Kan. 593, 227 P. 360; *Goos v. Brocks*, 117 Neb. 750, 223 N.W. 13.

"If, therefore, the provisions of the treaty have not been superseded or abrogated, they prevail over any requirements of California law which conflict with them. *Hauenstein v. Lynham*, 100 U.S. 483, 488-490." 331 US at 508.

The 1923 Treaty provision has thus been construed to vest the title to real property of estates in this country in German heirs or devisees. The requirements of ORS 111.070 (1)(b) and (c) place additional requirements upon such vesting and are therefore in conflict with the treaty and are of no effect. The provisions of the statute cannot operate to bar the right of the German heirs to inherit the real property.

The court realizes there is the practical problem of delivery of any benefits of the real property to the heirs at law in East Germany. The United States government does not recognize the regime established there and has no diplomatic relations with it. Also, the United States Treasury Department has issued the following:

"§ 211.2(a). It is hereby determined that postal, transportation, or banking facilities in general or local conditions in * * * the Russian Zone of Occupation of Germany, and the Russian Sector of Occupation of Berlin, Germany, are such that there is not a reasonable assurance that a payee in those areas will actually receive checks or warrants drawn against funds of the United States, or agencies or instrumentalities thereof, and be able to negotiate the same for full value." Treasury Dept. Circular 655, revised Nov. 14, 1964, 29 Fed. Reg. 15287, 31 C.F.R. 141 (1965).

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This court has determined that this official declaration may be regarded "as evidence that foreign beneficiaries would not receive their interests free from control amounting to, at least, a partial confiscation." *State Land Board v. Pekarek*, 234 Or 74, 82, 378 P2d 735 (1963).

Article XXV of the 1923 Treaty, which we have held to be still in force as applied to East Germany, provides as follows:

"A consular officer of either High Contracting Party may in behalf of his non-resident countrymen receipt for their distributive shares derived from estates in process of probate * * * provided he remit any funds so received through the appropriate agencies of his Government to the proper distributees, and provided further that he furnish to the authority of agency making distribution through him reasonable evidence of such remission."

Plaintiffs, therefore, claim the West German Consul is authorized to receive funds for them to be invested for their benefit by the West German government until such time as they may receive the funds.

Although Article XXV of the 1923 Treaty was incorporated into and made a part of the 1954 Treaty, we have, in this opinion, held that the 1954 Treaty does not extend to those persons who reside in that area over which West Germany does not have sovereignty. For that reason West German consular officers have no authority under the 1954 Treaty to act for and receive property for persons residing in East Germany.

The United States government has taken a similar view that West German Consuls have no authority to act on behalf of German nationals residing in East Germany. The following is an excerpt from a letter released by the Office of the Legal Adviser, Department of State, May 23, 1962:

"The United States does not recognize the regime in Eastern Germany as either a state or a government. The United States considers that the area is under the effective control of the Soviet Union
* * *

"* * * the position of the Department of State has been that consuls of the Federal Republic are not authorized to act on behalf of German nationals residing in Eastern Germany." Quoted in Contemporary Practice of the United States Relating to International Law, 57 Am J Int'l L 403, 410 (1963).

The fact that plaintiffs cannot immediately receive the benefit of decedent's real property does not mean that they cannot inherit or own it because we have determined that ORS 111.070 (1)(c), which makes their ability to receive the benefits of the property in East Germany a prerequisite to vesting of title, must yield to Article IV of the 1923 Treaty with Germany, which has been construed in *Clark v. Allen*, supra, as granting the rights of inheritance and ownership. The German heirs at law are now the owners of real property in this state.

The decree of the trial court is modified in that plaintiffs are declared to be decedent's heirs at law in respect to her real property only, and these proceedings

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are remanded for the entry of an order determining heirship in conformance with this opinion.

**OPINION OF THE SUPREME COURT OF THE
STATE OF OREGON**

IN BANC

**IN THE MATTER OF THE ESTATE OF
PAULINE SCHRADER, DECEASED
ZSCHERNIG ET AL, Appellants, v. MILLER ET AL,
Respondents.**

**[On Appellant's Petition for Rehearing]
Decided June 3, 1966**

**PETITION DENIED.
HOLMAN, J.**

Plaintiffs, in a petition for rehearing, again direct our attention to *Mullart v. State Land Board*, 222 Or 463, 353 P2d 531 (1960). That case held that Estonian nationals had a right to inherit personal as well as real property from estates in the United States of American nationals. The provisions of Article IV of the 1925 treaty with Estonia, 44 Stat 2379, T.C. No. 736, are identical with those of Article IV of the 1923 treaty with Germany construed in the principal opinion in this case. Plaintiffs argue, therefore, that the *Mullart* case requires this court to permit them to inherit the personal as well as the real property of the deceased despite the contrary holding in *Clark v. Allen*, 331 US 503, 67 S Ct 1431, 91 L Ed 1633 (1947).

Article IV of the Estonian treaty was not relied on

in *Mullart*. The court there held that the Estonian legatee had the right to inherit because the reciprocal provision of the Oregon statute, which required that United States nationals be permitted to inherit from estates in the country of the alien heir, devisee or legatee, was *satisfied by Estonian law*. It was therefore unnecessary to consider or rely on the effect of Article IV of the treaty. By contrast, plaintiff's right to inherit in this case depended upon the language of Article IV of the 1923 German treaty. Therefore, there is no conflict between this court's holding in *Mullart* and the principal opinion in this case.

The petition for rehearing is denied.

FINDINGS AND ORDER OF ESCHEAT

Entered by the Circuit Court of Multnomah County,
Oregon, on April 15, 1965, appealed from:

This cause came on regularly for hearing before this court on April 28, 1964, pursuant to a petition for escheat filed by the State of Oregon, by and through the State Land Board, and also a petition for determination of heirship filed by the relatives of the decedent, all of whom reside in the territory of East Germany under the government of the German Democratic Republic.

At the April 28 hearing and in a further hearing on August 18, 1964, and also during the presentation of oral arguments on April 9, 1965, the State Land Board appeared through Robert Y. Thornton, Attorney General

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of Oregon, by Walter L. Barrie, Assistant Attorney General, and the relatives of the decedent appeared through their attorney Peter A. Schwabe.

The court having heard the testimony of witnesses and arguments of counsel and having considered the evidence, and the matter having been duly submitted for decision, the court on April 9, 1965, rendered its Findings of Fact and Conclusions of Law:

(1) That Pauline Schrader died intestate in Portland, Oregon, on or about September 30, 1962, leaving an estate of real and personal property situated in Oregon; that said decedent was survived by a brother Oswald Zschernig and a sister Minna Pabel, and four other relatives, all named as plaintiffs in the petition for determination of heirship filed herein; that all of said relatives are residents and inhabitants of the German Democratic Republic of East Germany.

(2) That the evidence before the court did not establish the existence of reciprocity of inheritance rights as required by ORS 111.070 with respect to the German Democratic Republic of East Germany at the date of death of Pauline Schrader.

(3) That the 1923 Treaty of Friendship, Commerce and Consular Rights between the United States of America and Germany is no longer in existence and has no bearing upon the rights of the parties herein.

(4) That the 1954 Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany, is restricted to

the territorial limits set out in the treaty itself which excludes the territory under the government of the German Democratic Republic of East Germany, and, therefore, inhabitants of East Germany take no rights under the treaty.

(5) That ORS 111.070 does not invade the exclusive power of the Federal Government to regulate the foreign relations of the United States.

(6) That the clear proceeds of this estate situated in the State of Oregon have escheated to and become the property of the State of Oregon as of the date of death of said decedent Pauline Schrader and the clear proceeds thereof are distributable to the State Land Board of the State of Oregon for payment into the Common School Fund.

Based on the above findings of fact and conclusions of law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the petition of the State of Oregon, acting by and through the State Land Board, for finding and order of escheat is hereby granted, and

IT IS FURTHER ORDERED that the administrator of this estate pay and deliver the clear proceeds of this estate situated in the State of Oregon to the State Land Board of the State of Oregon for payment into the Common School Fund.

IT IS FURTHER ORDERED that the costs in this proceeding be charged against the estate.

DATED this 15th day of April, 1965.

/s/ WILLIAM L. DICKSON
Circuit Judge

ORDER ON MANDATE

Entered by the Circuit Court of Multnomah County,
Oregon on June 27, 1966, appealed from:

Whereas the court in the above entitled cause entered its order of escheat on the 15th day of April, 1965, in favor of the State Land Board of the State of Oregon and against the plaintiffs wherein it was ordered that the clear proceeds of the estate should be paid and delivered to the State Land Board of the State of Oregon for payment into the Common School Fund, and

Whereas the order of escheat of this court was appealed by the plaintiffs, and

Whereas the Supreme Court of the State of Oregon has modified the order of escheat of this court and has issued to this court its mandate in words and figures as follows:

"This cause on February 3, 1966, having been duly argued and submitted upon and concerning all questions arising upon the record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is partial error.

"IT THEREFORE IS CONSIDERED, ORDERED and DECREED that the order of escheat of the court below rendered and entered in this

cause be and the same hereby is modified in that plaintiffs are declared to be decedent's heirs at law in respect to her real property only, and that the cause be remanded to said court with directions to enter an order determining heirship in conformity with the opinion of the court herein and in accordance therewith.

"IT FURTHER IS ORDERED that appellants have and recover of and from respondents their costs and disbursements in this court taxed at \$41.00.

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the prior order of this court heretofore entered on the 15th day of April, 1965, be and the same is modified as follows:

The plaintiffs herein, Oswald Zschernig, Minna Pabel, Olga Herta Winckler, Alfred Koester, Johanna Blaschke, and Hans Fuessel, are relatives of the decedent and the decedent's heirs at law in respect to the decedent's real property only and therefore the above named heirs are the owners of the real property in the State of Oregon in the estate of the decedent Pauline Schrader.

IT IS FURTHER ORDERED that the plaintiffs have and recover their costs and disbursements taxed in the Supreme Court of the State of Oregon in the sum of \$41.00 from the estate.

Dated this 27th day of June, 1966.

/s/ WILLIAM L. DICKSON
Circuit Judge

ORAL OPINION

By the Honorable William L. Dickson, Circuit Judge,
Rendered on April 9, 1965.

THE COURT: Gentlemen, at the outset I want to say to you that I have enjoyed the privilege of studying the briefs that were as well prepared and covered the subject as exhaustively as the briefs that each of you submitted.

Also, I want to say that it is not my province to express my political opinion but only my judicial opinion in determining a matter that is before me.

We are not concerned in any way with the 1923 Treaty between the United States of America and Germany. It was abrogated long before the times in which we are interested. We are concerned with the Treaty of 1954 between the United States of America and the Federal Republic of Germany, which was ratified on July 14, 1956. This Court is of the opinion that both the evidence and the law show that said Treaty is restricted to the territorial limits set out in the Treaty itself and has no binding effect on either of the parties insofar as any other area is concerned. There are and have been since 1949 two separate and distinct governments controlling what used to be a unified Germany. There is, as we know, the government of the Federal Republic of Germany with which the 1954 Treaty was made, and there is the government of the German Democratic Republic that is the satellite of Communist Russia. We know that neither of those governments can

impose its will on the residents and inhabitants of the territory of the other. Some day there may be a unified Germany recognized by the United States of America that will encompass all of the territory that was Germany before World War II, but that is not the case at the moment. This 1954 Treaty with which we are concerned has no application whatsoever to the people in East Germany and they have gained no rights by it.

The contention that ORS 111.070 is in violation of the existing policy of the Government of the United States of America and constitutes an unlawful and unauthorized attempt by the State of Oregon to invade the exclusive power of the Federal Government to regulate the foreign relations and therefore is invalid and should be given no effect by this Court is without merit in view of the decision of the United States Supreme Court in the case of *Clark v. Allen*, 331 U.S. 503, 91 L. Ed. 1633. If the rules of law announced in that case should be changed because of changed conditions in the world or for political reasons, the Congress or the Supreme Court of the United States should revise the laws, certainly not this Probate Court.

The evidence before the Court does not establish the existence of reciprocity as required by ORS 111.070 as of the date of death of Pauline Schrader on September 30, 1962.

It is the judgment of this Court that the assets of the estate escheat to the State of Oregon.

I call the attention of counsel to the fact that I will be on vacation for a month after Friday of next week.

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Since this case has been before this Court for so long awaiting the final brief that reached me only on April 2, 1965, I suggest that it would be well to get the order in next week.

Thank you again for your very fine preparation of the case. It is a pleasure to have lawyers be so thorough.
[remarks of court and counsel on costs omitted].

ADDENDUM: The administrator Miller, designated as an appellee, being in the position of a mere stakeholder, has not participated and is not expected to participate actively in this litigation. [*Lappy's Estate, State Land Board of Oregon v. Sovenko*, 202 Or. 571, 277 P.2d 781, 213 Or. 368, 322 P.2d 908 at 910 (1958), holding against reciprocity with the USSR and escheating the inheritances of the Russian heirs.]

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM 1946

No.

In the Matter of the Estate of
PAULINE SCHRADER, Deceased.

OSWALD ZSCHERNIG, MINNA PABEL, OLGA HERTA
WINCKLER, ALFRED KOESTER, JOHANNA BLASCHKE
and HANS FUESSEL,

Appellants,

v.

WILLIAM J. MILLER, Administrator of the Estate of
Pauline Schrader, Deceased, MARK O. HATFIELD,
TOM McCALL and ROBERT W. STRAUB, respectively,
the Governor, Secretary of State and State Treasurer
of Oregon, constituting the STATE LAND BOARD OF
OREGON, and all persons unnamed or unknown having
or claiming any interest in the Estate of Pauline
Schrader, Deceased,

Appellees.

Appeal from the Supreme Court of the State of Oregon

APPELLEE'S MOTION TO DISMISS OR AFFIRM

Appellee, State Land Board of Oregon, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, respectfully moves this Court to dismiss the above entitled appeal or, in the alternative to affirm the judgment of the Supreme Court of the State of Oregon on the grounds that one of the federal questions sought to be reviewed was neither timely nor properly raised nor expressly passed upon by the courts

of the State of Oregon and further that this appeal does not present a substantial federal question.

STATEMENT

This is an appeal from a decision of the Supreme Court of Oregon modifying an Order of Escheat entered by the Circuit Court of Multnomah County, Oregon. The opinion of the Supreme Court of Oregon held that the heirs of an Oregon decedent, which heirs reside in the German Democratic Republic (East Germany or the Soviet Zone of Germany) were entitled to inherit the real property of the decedent, located in Oregon, under Article IV of the Treaty of Friendship, Commerce and Consular Rights with Germany, December 8, 1923, 44 Stat. 2132, T.S. No. 725 (effective October 14, 1925) amended June 3, 1935, 49 Stat. 3258, T.S. No. 897. The court further held that in so far as the provisions of the Treaty of 1923 did not provide for the inheritance of personal property of the decedent, located in Oregon, Section 111.070, Oregon Revised Statutes, Oregon's reciprocal inheritance statute, would apply.

ORS 111.070 is as follows:

"(1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:

"(a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take

real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such alien is an inhabitant or citizen;

"(b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and

"(c) Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.

"(2) The burden is upon such nonresident alien to establish the fact of existence of the reciprocal rights set forth in subsection (1) of this section.

"(3) If such reciprocal rights are not found to exist and if no heir, devisee or legatee other than such alien is found eligible to take such property, the property shall be disposed of as escheated property."

The Supreme Court of Oregon found that the East German heirs of the decedent had not made the necessary showing to bring themselves within the terms of ORS 111.070 and therefore the court affirmed the escheat of the personal property of the decedent.

Appellants contend on this appeal that ORS 111.070 is repugnant to Article I, § 8, Article I, § 10, and/or the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and that this statute is invalid as it conflicts with overriding federal law and policy.

The position of the Appellee State Land Board of Oregon is that inasmuch as Appellants did not raise

the issue in the courts of Oregon and the Supreme Court of Oregon did not decide the constitutionality of ORS 111.070 in light of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States; such an issue was not timely or properly raised and may not be properly considered here.

The Appellants did raise and the Supreme Court of Oregon did decide the issue of whether ORS 111.070 was an unconstitutional attempt by the state to invade the exclusive power of the federal government to regulate the foreign relations of the United States. The Court decided that the statute was not an unconstitutional invasion of federal powers by the State of Oregon on the basis of this Court's decision in the case of *Clark v. Allen*, 331 U.S. 503 (1947). Therefore it is our contention that this appeal does not present a substantial federal question.

ARGUMENT

- 1. Failure to raise the federal constitutional question of due process and equal protection in the state courts precludes consideration of the question here.**

Appellants here, as one of their questions on appeal, seek to question the validity of ORS 111.070 as being repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States for the first time on this appeal without ever having presented the issue to the courts

of the State of Oregon. In an "unbroken line of precedent" the Supreme Court of the United States has held that where the question has not been raised in the state courts and has not actually been decided by the highest state court, here the Supreme Court of the State of Oregon, the question will not be entertained. *Beck v. Washington*, 369 U.S. 541 (1962); *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960); *John v. Paullin et al.*, 231 U.S. 583 (1914).

In addition, the law of Oregon requires that constitutional questions be raised in the trial court before they may be considered upon appeal. *Ross v. State Land Board*, 241 Or. 442, 443, 406 P.2d 549 (1965); *State Highway Commission v. Helliwell*, 225 Or. 588, 358 P.2d 719 (1961); *Senger v. Vancouver-Portland Bus Co.*, 209 Or. 37, 298 P.2d 835, 304 P.2d 448, 62 A.L.R.2d 265 (1956); *The Alpha Corporation v. Multnomah County*, 182 Or. 671, 189 P.2d 988 (1948).

2. This appeal presents no substantial federal question not previously decided by this court.

As Appellants state in their Jurisdictional Statement, consideration of this appeal would necessitate a re-examination and invalidation of the long established and followed precedent of *Clark v. Allen*, 331 U.S. 503 (1947). The Supreme Court of the State of Oregon relied upon the Clark case almost totally in arriving at its decision in the present case.

The same portion of the same treaty was involved in the Clark case as is involved here, Article IV of the

Treaty of Friendship, Commerce and Consular Rights with Germany, December 8, 1923, 44 Stat. 2132, T.S. No. 725 (effective October 14, 1925) amended June 3, 1935, 49 Stat. 3258, T.S. No. 897, and the Clark case was followed to exactly the same result here.

Appellants' challenge to the statute here draws the same issue as in the Clark case in that the reciprocal inheritance statute of Oregon, ORS 111.070, is here contested as repugnant to Article I, § 8 and Article I, § 10, of the Constitution of the United States, as was the reciprocity statute of California in Clark v. Allen.

Summarizing, this Court in Clark v. Allen, 331 U.S. at 517, 518, found that the local laws of succession of property should govern unless the rights would be "affected by an overriding federal policy, as where a treaty makes different or conflicting arrangements", which the Court found did not exist as to personal property under the Treaty of 1923. The Court recognized that the laws of reciprocity regarding succession to property might have an incidental or indirect effect in foreign countries but that such laws did not constitute negotiating with a foreign country by a state within the prohibition of Article I, § 10, of the Constitution of the United States.

Appellants seem to contend that changing conditions since the date of the decision of Clark v. Allen, *supra*, either rise to the stature of or have given rise to an overriding federal policy against such state reciprocity statutes relating to succession of property.

While the change of events may well precipitate a

change in federal policy, until and unless that policy is announced by the executive or legislative branch of the federal government there has in fact been no change in such policy. Appellants can point to no such announced change of policy or law.

Here the Treaty of 1923 as amended and as interpreted by this Court, is the policy of the federal government. The only change which has been enunciated is the Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, October 29, 1954, 7 U.S.T. & O.I.A. 1839, TIAS No. 3593 (effective July 14, 1956), which supersedes the Treaty of 1923 as to certain restricted geographical areas of Germany and this Treaty was found to be inapplicable to the present case by the Supreme Court of Oregon.

Thus there is no announced overriding federal policy which would impair the rights of the states to legislate regarding the testate or intestate succession to property within the respective states to which Appellants can refer.

This Court has previously dismissed two appeals presenting what Appellee believes to have been similar questions, *Ioannou v. New York*, 371 U.S. 30 (1962); *Re Braier's Estate*, 305 N.Y. 148, 111 N.E.2d 424, app. dismd. sub nom *Kalmane v. Green*, 346 U.S. 802 (1953), for lack of substantial federal questions.

CONCLUSION

For the foregoing reasons Appellee, State Land Board of Oregon, respectfully submits this appeal should be dismissed or in the alternative that the decision of the Supreme Court of Oregon be affirmed.

Respectfully submitted,

ROBERT Y. THORNTON
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JOHN F. DAVIS, CLERK

**In the Supreme Court
of the United States**

OCTOBER TERM 1966

No. 730

21

In the Matter of the Estate of
PAULINE SCHRADER, Deceased.

**OSWALD ZSCHERNIG, MINNA PABEL, OLGA HERTA
WINCKLER, ALFRED KOESTER, JOHANNA BLASCHKE
and HANS FUESSEL,**

Appellants,

v.

**WILLIAM J. MILLER, Administrator of the Estate of
Pauline Schrader, Deceased, MARK O. HATFIELD,
TOM McCALL and ROBERT W. STRAUB, respectively
the Governor, Secretary of State and State Treasurer
of Oregon, constituting the STATE LAND BOARD OF
OREGON, and all persons unnamed or unknown having
or claiming any interest in the Estate of Pauline
Schrader, Deceased,**

Appellees.

Appeal from the Supreme Court of the State of Oregon

**APPELLANTS' BRIEF IN OPPOSITION TO MOTION
TO DISMISS OR AFFIRM**

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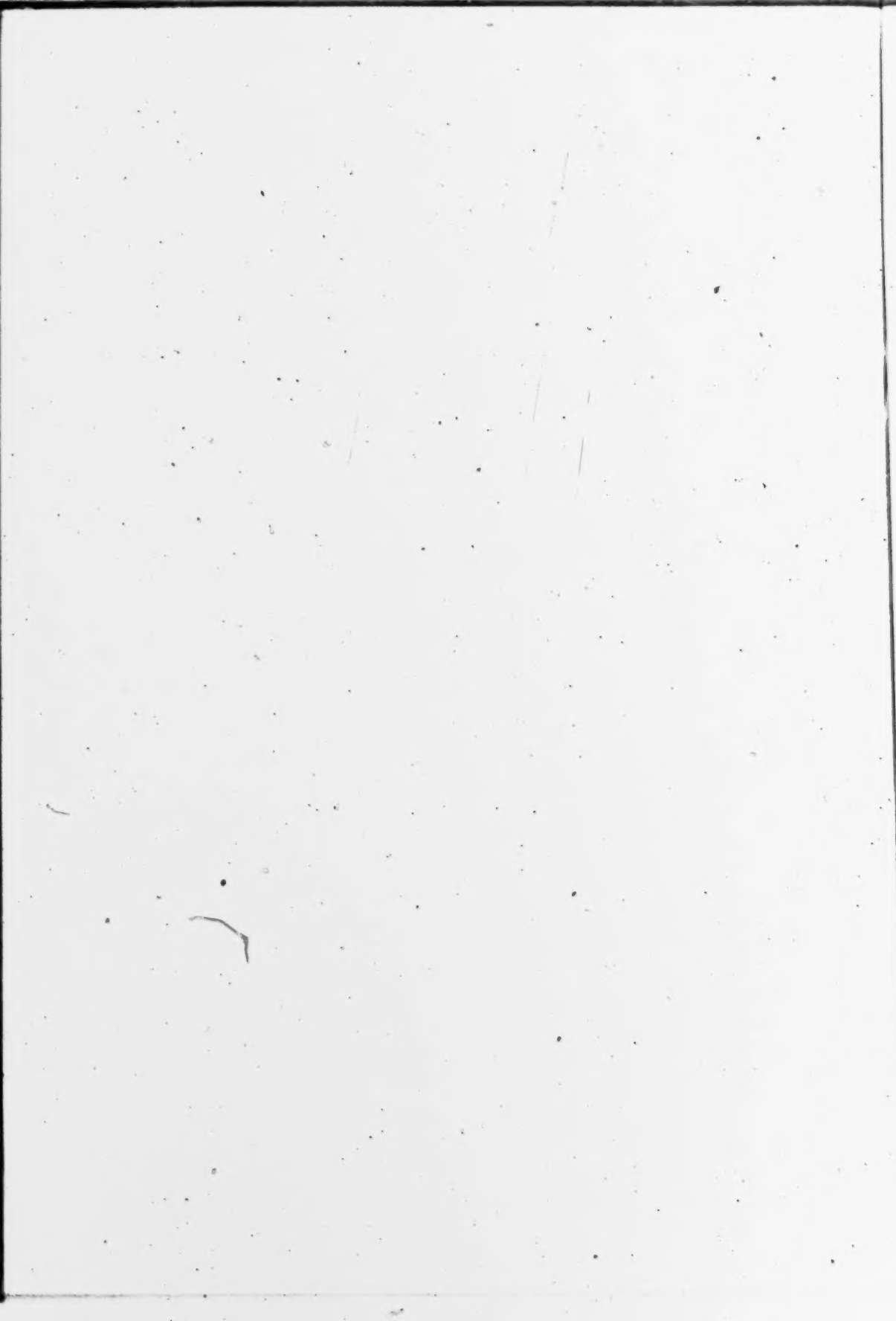
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In the Supreme Court of the United States

OCTOBER TERM 1966

No. 730

In the Matter of the Estate of
PAULINE SCHRADER, Deceased.

**OSWALD ZSCHERNIG, MINNA PABEL, OLGA HERTA
WINCKLER, ALFRED KOESTER, JOHANNA BLASCHKE
and HANS FUESSEL,**

Appellants,

v.

**WILLIAM J. MILLER, Administrator of the Estate of
Pauline Schrader, Deceased, MARK O. HATFIELD,
TOM McCALL and ROBERT W. STRAUB, respectively
the Governor, Secretary of State and State Treasurer
of Oregon, constituting the STATE LAND BOARD OF
OREGON, and all persons unnamed or unknown having
or claiming any interest in the Estate of Pauline
Schrader, Deceased,**

Appellees.

Appeal from the Supreme Court of the State of Oregon

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellee, State Land Board of Oregon, bases its motion to dismiss or affirm on the claims 1) that one of the federal questions sought to be reviewed was neither timely nor properly raised nor, expressly passed upon by the courts of the State of Oregon, and 2) that this appeal does not present a substantial federal question.

REPLY TO ARGUMENT ON POINT ONE

In appellee's argument mention is made only of the due process and equal protection clauses of the Fourteenth Amendment, which ground for questioning the validity of ORS 111.070, it is contended, was not presented as an issue in the courts of the State of Oregon. However, appellee says nothing of the other ground on which the constitutionality of the Oregon statute was questioned, namely Article I, § 10, specifically mentioned in the Oregon Supreme Court's opinion, as was also Article VI [Vol. 82 Or. Adv. Sh. at 452, Jur. St. App. 19-20]. That the invalidity of ORS 111.070 was alleged in the pleadings and contended for from the very inception and at every stage of the litigation in the courts below is not denied and is amply demonstrated under "Federal Questions Raised and Passed Upon in Courts Below" beginning at page 10 of the Jurisdictional Statement.

It may be pointed out, furthermore, that if a state statute be held invalid because in violation of Article I, § 10, Article I, § 8, Article VI or any other provision of the Constitution, *it results therefrom* that property escheated under such a statute is being taken by the state without due process of law or compensation.

If, contrary to appellants' firm conviction that their procedure before this Court is by appeal, they should be found mistaken, then appellants respectfully ask that, pursuant to 28 U.S.C. § 2103, the papers

whereon this appeal was taken be regarded and acted upon as a petition for writ of certiorari and as if duly presented to this Court at the time the appeal was taken. [*Hanson v. Deckla*, 357 U.S. 235 (1958)].

REPLY TO ARGUMENT ON POINT TWO

As was to be anticipated, appellee argues that *Clark v. Allen*, 331 U.S. 503 (1947) should be determinative of this case and says that appellants "can point to no such announced change of policy or law," the word "such" referring to a "change in federal policy" [Motion, p. 71].

Appellee overlooks the firmly settled rule, redeclared by this Court in *Nashville C. & St. L. Ry. v. Walters*, 294 U.S. 405, 415 and quoted at page 13 of the Jurisdictional Statement that:

"A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied."

In succeeding pages of their Jurisdictional Statement appellants point out the very material differences between the 1941 California reciprocity statute involved in *Clark* and the much harsher, far more confiscatory 1951 Oregon reciprocity statute here involved, the great volume of litigation on inheritance rights of aliens which has ground its way through the courts of numerous states during the two decades since *Clark v. Allen*, the harsh, intemperate, derisive,

plementing their views of the beneficiary's government will even more clearly have such an effect."

p. 333:

"When states legislate on aliens' rights to legacies, they are entering an area usually thought to belong exclusively to the federal government. The executive department of the federal government is charged with the conduct of foreign affairs, free from state interference. [fn. 28 citing *U. S. v. Pink*, 315 U.S. 203, 233 (1941) and *U. S. v. Belmont*, 301 U.S. 324, 331 (1937)]. The states do, however, retain exclusive control over matters of decedents' estates [fn. 29 citing *Blythe v. Hinkley*, 180 U.S. 333 (1901) for the proposition that 'a state may grant inheritance rights to all aliens'; conversely citing *Ter-race v. Thompson*, 263 U.S. 197 (1923) for the proposition that a state may 'deny inheritance rights to all aliens.']. When these two areas of the law overlap, as they surely must where alien beneficiaries are concerned, conflict is likely to result."

This is one of appellants' major points in this appeal—that invasion by the states of the exclusive federal power to regulate the foreign relations of the United States occurs the moment any state seeks to lay down its own conditions and requirements, by statute, under which non-resident aliens may inherit or be barred from inheriting in that state. Continuing the above quotation:

"State courts applying a reciprocity rule must.

sit in judgment on a foreign government, and decide whether it treats American citizens in a prescribed manner."

Thus the "Iron Curtain Rule" was born and generally adopted by the eastern states with their relatively mild withholding statutes [such as § 269a of the New York Surrogate Courts Act] as well as the western states with their confiscatory statutes [such as Oregon's § 111.070 which is directly involved here]. Continuing:

p. 334:

"If the alien loses, the state court may have ruled that the foreign representatives have incorrectly stated their own inheritance law."

[exactly what the Oregon Supreme Court did in *State Land Board of Oregon v. Pekarek*, 234 Or. 74, 378 P2d 374 (1963). See quotation from 234 Or. 83 on pp. 15-16 of appellants' Jurisdictional Statement herein, and other examples cited on p. 16 thereof].

Our State Department, maintaining friendly relations with the alien's government, may well be embarrassed by the 'unfriendly' action of the state court [fn. 32 quoting the United States Attorney General's statement on p. 75 of his petitioner's brief in *Clark v. Allen*, 331 U.S. 503 (1947) that the California reciprocity statute—then much milder than Oregon's present § 111.070 —'will be a recurrent source of diplomatic friction']. The latter may appear to the alien's government to be the action of the entire nation. In any event it is likely to engender resentment.

American interests abroad may thus be materially affected by a retaliatory state statute purporting to regulate inheritance only."

Certainly the "Iron Curtain Rule" and its denial of their inheritance rights to beneficiaries in most if not all of the eastern European countries is in direct conflict with the policy of the Federal Government, as reiterated most recently in the Chief Executive's statement of October 7, 1966, heretofore mentioned, to foster closer and more friendly relations with the nations of eastern Europe. Concluding quotation from the above treatise: [p. 336]

p. 336:

"If the federal government has adopted an official attitude of friendliness toward a foreign nation, then a state statute which serves to create any sort of ill will may properly be considered an unwarranted incursion by that state into the foreign affairs field." [fn. 48 quoting as follows from *U. S. v. Curtiss-Wright Corp.* 299 U.S. 304, 319 (1936):

'Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.'"

With what great force those words apply to the case

at bar! Truly prophetic was this treatise, published in 1951, when viewed in the light of world events during the last fifteen years and particularly the posture of the Federal Government towards the foreign nations directly affected by the "Iron Curtain Rule." As the treatise concludes, the decision to cut off the flow of inherited property to alien beneficiaries "should, in other words, be made by the federal government."

At page 21 of the Jurisdictional Statement under "Questions of Great Public Importance Presented" appellants state that "the holding of this Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) seems to point the way." Reference is respectfully made to Professor Henkin's analysis of and comments on that decision entitled "The Foreign Affairs Power in the Federal Courts: *Sabbatino*" in 64 *Columbia Law Review* 805 (1964) in which he points out that the Act of State doctrine has become part of the body of "federal common law," involving delicate issues of foreign policy and foreign relations on which the individual states may not place their own judicial interpretations. Thus in *Sabbatino* the state court of New York could not impose its exception on the Act of State doctrine by holding that it was not applicable where the court deemed the act of the sovereign foreign state to be in violation of international law.

By the same token, while it may, for the purpose of this argument, be conceded that a state may bar all nonresident aliens from inheriting, it becomes an invasion of the exclusive federal province, of the "fed-

eral common law," for a state to lay down terms and conditions which a foreign nation must meet in order that its nationals may inherit in that state, and to confiscate its nationals' inheritance if the state's terms and conditions are not met. It is difficult to conceive of a more sensitive area of foreign relations.

At page 807 Professor Henkin quotes as follows from Chief Justice Fuller's opinion in *Underhill v. Hernandez*, 168 U.S. 250 (1897) at 252:

"Every sovereign state is bound to respect the independence of every other sovereign state and the courts of one country will not sit in judgment on the acts of the government of another done within its territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves,"

that is by the executive branch at the diplomatic level. Exactly so in the field of reciprocal inheritance rights, the courts of the United States, and particularly the courts of the individual states, may not "sit in judgment" on the constitutions, the laws, the foreign exchange regulations and other "acts" of sovereign foreign states, condemn them as not conforming to American, or the individual state's, or the individual judge's concepts or requirements, and deny the nationals of such sovereign states their rights of inheritance, even to the point of confiscation, which the law abhors. If terms and conditions for aliens to inherit in the United States are to be laid down and imposed, they must be uniform throughout the coun-

try and must and can be imposed only by the federal government. If it were not so, the end result of state legislation in this field could conceivably be fifty different sets of terms and conditions, and fifty different adjudications defining what aliens may inherit and what aliens are barred from inheriting in any particular state of this country. Foreign nations may not deal or negotiate with the individual states in this or any other field. In the absence of promptest action on the federal level, utter chaos will most certainly result.

CONCLUSION

Appellants submit that there is no merit to either of the objections made in appellee's motion to dismiss or affirm. Clearly the questions and issues here presented were in fact raised, considered and passed upon in the courts below. There are indeed presented here federal questions of the greatest substance, of the greatest and gravest public importance and urgency.

Appellants reiterate their prayer that jurisdiction by this Court be noted and this case set for plenary consideration.

Respectfully submitted,

PETER A. SCHWABE, SR.
PETER A. SCHWABE, JR.
Attorneys for Appellants.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 730

IN THE MATTER OF THE ESTATE OF PAULINE SCHRADER,
DECEASED, OSWALD ZSCHERNIG, ET AL., APPELLANTS

v.

WILLIAM J. MILLER, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF
OREGON

MEMORANDUM FOR THE UNITED STATES

By order of the Court dated January 9, 1967, the Solicitor General was invited to express the views of the United States with respect to this case. For the reasons stated below, we do not believe that it raises federal questions of sufficient significance to necessitate review by this Court.

1. Pauline Schrader, a resident of Oregon, died intestate on September 30, 1962. Her sole heirs were appellants, residents of the Soviet Zone of Germany. Acting pursuant to Section 111.070 of the Oregon Revised Statutes (J.S. 6-7), the State of Oregon filed a petition in the probate court for the escheat of the decedent's estate, which comprised both real and per-

sonal property located in Oregon. Appellants in turn filed a petition to determine their heirship and obtain distribution of the estate.

The State's claim of escheat was based upon O.R.S. 111.070, which conditions a non-resident alien's right to inherit property within Oregon upon (a) the existence of a reciprocal right of American citizens to inherit upon the same terms and conditions as citizens of the country of which the alien heir is an inhabitant or citizen, (b) the right of American citizens to receive payments within the United States from the estates of decedents dying within such foreign country, and (c) proof that the alien heirs of the American decedent will receive the benefit, use or control of their inheritance without confiscation. The statute places the burden on the alien heir to prove that all of the conditions are met. If these conditions are not satisfied, and there are no other heirs, the property is to escheat to the State.

The probate court, holding that "the evidence before the court did not establish the existence of reciprocity of inheritance rights as required by O.R.S. 111.070" with respect to the Soviet Zone of Germany at the date of the decedent's death, ordered that all the property of the estate escheat to the State of Oregon (J.S. App. 25-27). The Supreme Court of Oregon (J.S. App. 1-24) modified the decree of escheat so as to apply only to the decedent's personal property. It ruled that the right of inhabitants of the Soviet Zone of Germany to inherit real property in the United States was guaranteed by Article IV of the 1923 Treaty of Friendship, Commerce and Consular Rights

with Germany (App. *infra*, p. 9)¹ and hence the Oregon statute could not govern devolution of such property. *Kolovrat v. Oregon*, 366 U.S. 187. Article IV of that treaty survived World War II, the court concluded, and was not affected by the 1954 Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany,² which only applies to West Germany. As to the personal property, however, the Supreme Court of Oregon held on the authority of *Clark v. Allen*, 331 U.S. 503, that Article IV of the 1923 Treaty was inapplicable and that, therefore, the probate court had correctly applied the provisions of O.R.S. 111.070. Further relying upon *Clark v. Allen*, the court determined that the Oregon statute was constitutional.

2. In *Clark v. Allen*, this Court was called upon to determine whether a California statute—in relevant part identical to the Oregon statute involved here³—

¹ December 8, 1923, 44 Stat. 2132, T.S. No. 725 (effective October 14, 1925), amended June 3, 1935, 49 Stat. 3258, T.S. No. 897. Hereafter referred to as the 1923 Treaty.

² 7 U.S.T. & O.I.A. 1839, TIAS No. 3593 (effective July 14, 1956), hereafter referred to as the 1954 Treaty.

³ For purposes of this litigation the California statute in *Clark v. Allen* cannot be distinguished from the Oregon statute. Appellants point out that the Oregon statute is in one respect more stringent than the California statute in that the California statute did not contain a provision similar to Section 1(c) of O.R.S. 111.070, which requires foreign heirs to prove that they will "receive the benefit, use or control" of their inheritance (J.S. 14). However, Section 1(c) was not critical to the result in the Oregon courts. The heirs also failed to meet the necessary criteria of Section 1 (a) and (b), standards also found in the California statute. Indeed, as the court below noted, they did not even contend that the requirements

could be invoked to bar the inheritance by German heirs of the personal property of an American citizen residing in California. Answering the question in the affirmative, the Court held (1) that the 1923 Treaty with Germany did not "cover personalty located in this country and which an American citizen undertakes to leave to German nationals" (331 U.S. at 516) and (2) that the application of the California statute to such property was not an unconstitutional extension of State power into the field of foreign affairs.

In the present litigation, appellants' main argument in the court below was that their right of inheritance of both real and personal property was guaranteed by the 1954 Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, which, they contended, applied to the Soviet Zone of Germany. Assuming that the 1954 Treaty did not apply to the Soviet Zone, appellants contended, in the alternative, that this Court's construction of Article IV of the 1923 Treaty in *Clark v. Allen* (as being applicable only to real property) was incorrect,* and additionally that the portion of *Clark v. Allen* upholding the constitutionality of the State reciprocal inheritance law should be re-examined. In this Court, however, appellants apparently do not challenge the holdings of the Oregon of Section 1(b) could be met (J.S. App. 16). Thus, if, as this Court held in *Clark v. Allen*, the first two standards were permissible, there would be no occasion to consider the permissibility of the third.

*See Petition for Rehearing and Brief, p. 17.

court on the questions of treaty interpretation;⁵ they now raise only the issue of the constitutionality of the Oregon reciprocity statute.

3. Appellants contend that "changed conditions" warrant reconsideration of the constitutional issue decided in *Clark v. Allen* (J.S. 13). Specifically, they allege that the Oregon statute, and others like it, have impermissibly interfered with the foreign relations and foreign policy of the United States and that their enforcement "must be a source of the deepest embarrassment to the State Department, and add gravely to its conduct of the relations with [involved] countries * * *" (J.S. 17). The Department of State has advised us, however, that State reciprocity laws, including that of Oregon, have had little effect on the foreign relations and policy of this country. Indeed, while asserting that the criticism of foreign regimes implied or expressed in State-court decisions under the reciprocity laws are bound to excite adverse international reaction, appellants concede that "so far the reaction has not crystallized" (J.S. 20). Appellants' apprehension of a deterioration in international relations, unsubstantiated by experience, does not constitute the kind of "changed conditions" which might call for re-examination of *Clark v. Allen*.

Nor do we agree with appellants' broad constitutional theory that—regardless of its actual impact on

⁵ The Department of State takes the position that the Oregon court correctly ruled that the 1954 Treaty does not apply to the Soviet Zone, that the 1923 Treaty is still effective, and that the latter is applicable to the Soviet Zone.

foreign affairs—the Oregon statute is an “invasion of the exclusive federal power to regulate * * * foreign relations” (J.S. 13). The federal power over foreign relations, like the commerce power, “embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature * * *.” *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. 299, 319. For much the same reasons that not all State regulation of transactions in interstate commerce is precluded by the federal commerce power,⁶ not all State enactments touching on foreign affairs are precluded by the “brooding omnipresence” of federal authority in that area. Unquestionably, State regulations must yield when they collide with the exercise of the federal authority. See *Hines v. Davidowitz*, 312 U.S. 52. But it is not contended here that the Oregon act is in conflict with any federal law or policy bearing upon the subject matter of this litigation. Moreover, the State’s obvious interest in regulating the devolution of property within its borders is not lightly to be subordinated. Cf. *United States v. Burnison*, 339 U.S. 87 (upholding a State statute prohibiting testamentary bequests to the United States). The mere fact that a State law may have “some incidental or indirect effect in foreign countries” is not a sufficient basis for declaring it invalid. *Clark v. Allen*, 331 U.S. at 517.

4. As noted above, we do not believe that in the

⁶ See *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424; *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440.

present context the constitutional issue raised by appellants is a substantial one. We point out, however, that should the Court undertake to note probable jurisdiction, it would become appropriate to re-examine the issue of treaty interpretation which lies at the threshold of the constitutional issue which appellants tender. Thus, if the Court were to conclude, contrary to its earlier reading of the 1923 Treaty in *Clark v. Allen*, that the treaty *does* apply to the devolution of personal property left by an American national in this country,⁷ this case would be at an end.⁸

So saying, we do not imply that there are independent reasons for re-examining at this time the issue of treaty interpretation decided in *Clark*. The 1923 Treaty, having been superseded so far as West Germany is concerned, applies only to the Soviet Zone—an area as to which the current state of our relations presents a unique situation of uncertain duration. Moreover, although the relevant language in the 1923 Treaty appears in some 34 other treaties, this Court's liberal interpretation of the treaty involved in *Kolovrat v. Oregon*, 366 U.S. 187, would

⁷ If the decedent had died a national of Germany, it would be clear that the 1923 Treaty does apply. *Clark v. Allen*, 331 U.S. at 516. The record does not reveal Mrs. Schrader's nationality, but the Oregon court assumed that she was American (J.S. App. 19, n. 5). In so doing, the court relied on this Court's similar assumption in *Clark*. But there the Court simply held that the government was not entitled to a judgment on the pleadings in the absence of an allegation as to the decedent's nationality (331 U.S. at 516).

⁸ The State Department's view of the 1923 Treaty was not accepted by the Court in *Clark v. Allen*. See, in this connection, Meekison, *Treaty Provisions for the Inheritance of Personal Property*, 44 Am. J. Int'l L. 313 (1950).

support an argument for a broader reading of the personal property clause in the other treaties, should the issue arise in future litigation. See also *Corbett v. Stergios*, 381 U.S. 124.

5. In sum, we perceive no compelling reason for re-examining *Clark v. Allen* in the present case. We do not agree with appellants that the present appeal raises "questions of vast national and international importance most seriously affecting the foreign relations of the United States" (J.S. 24-25). Accordingly, we do not urge plenary review.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MARCH 1967.

APPENDIX

Article IV of the 1923 Treaty of Friendship, Commerce, and Consular Rights with Germany provides as follows:

Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.

In the Supreme Court of the United States

OCTOBER TERM 1966

No. 730

21

In the Matter of the Estate of

PAULINE SCHRADER, Deceased.

OSWALD ZSCHERNIG, MINNA PABEL, OLGA HERTA
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Appellees.

Appeal from the Supreme Court of the State of Oregon

APPELLANTS' REPLY TO MEMORANDUM FOR THE UNITED STATES

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Appellees.

Appeal from the Supreme Court of the State of Oregon

APPELLANTS' REPLY TO MEMORANDUM FOR THE UNITED STATES

Appellants' basic premise in this appeal has been that during the twenty years or so since *Clark v. Allen*, 331 U.S. 503 (1947) very material changes in conditions have occurred which warrant reconsideration of the constitutional issue there decided. That issue was whether or not California's application of

its reciprocal inheritance rights statute [Probate Code § 259], similar to but significantly less demanding than Oregon's ORS 111.070 here involved, was an unconstitutional extension of state power into the field of foreign relations.

In his Memorandum for the United States the Solicitor General takes the position that there have not been "changed conditions" to warrant reconsideration of the constitutional issue decided in *Clark v. Allen*, that no compelling reason for such reconsideration exists in the present case and he does not therefore urge plenary review. Presumably this conclusion is based primarily, if not wholly, upon the advices of the Department of State "that State reciprocity laws, including that of Oregon, have had little effect on the foreign relations and policy of this country" (Memo. 5). It is significant that the word is "little", not "no", so it is fair to say that there has been *some* discernible effect. That the discernible, identifiable effect may indeed be described as "little" does not detract from the cogency of Mr. Justice Douglas' quotation in his dissent in *Ioannou v. New York*, 371 U. S. 30, 31 (1962), from *United States v. Belmont*, 301 U.S. 324, 331 (1936) that

"[C]omplete power over international affairs is in the national government and is not and cannot be subject to *any* curtailment or interference on the part of the several states." [emphasis ours]

Who is to measure, who, indeed, can measure precisely to what extent Oregon's confiscatory reciprocity

statute, with which we are here directly concerned, similar statutes of California, Montana, Iowa, Nebraska, etc., even the mild withholding statutes of the eastern states, such as New York, Pennsylvania, New Jersey, Massachusetts, etc., interfere with the national government's "complete power over international affairs"? The Department of State does concede at least a measure of such interference. Of equal cogency is the quotation in *Ioannou* [371 U.S. at 32] from *Hines v. Davidowitz*, 312 U.S. 52, 64:

"Experience has shown that international controversies of the gravest moment, sometimes leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government."

Even the mild, non-confiscatory restraints against actual transmission of inheritance funds to heirs in the so-called "Iron Curtain" countries practiced by New York surrogates under § 269-a of the New York Surrogate's Court Act were deemed to "... affect international relations in a persistent and subtle way." Reference was made to Chaitkin, *The Rights of Residents of Russia and its Satellites to Share in Estates of American Decedents*, 25 So. Calif. L. Rev. 297 (1951-2) [371 U.S. at 32].

A more recent article on the subject, entitled "Soviet Heirs in American Courts" by Professor Harold J. Berman of Harvard University, 62 Col. L. R. 257 (1962), relates numerous instances where probate judges, by highly uncomplimentary remarks about the governments or officials of the "Iron Curtain"

countries, made it clear that their decisions were motivated largely if not wholly by their personal views and sentiments.

Arbulich's Estate, 41 C.2d 86, 257 P.2d 433 (1953) is a typical, illustrative case. The presiding probate judge of the Superior Court in San Francisco ruled against reciprocity with Yugoslavia, held the testator's brother in Yugoslavia, who was the sole beneficiary, ineligible to inherit, and awarded the estate to another brother, living in San Francisco, who had been specifically disinherited in the will. The Ambassador of Yugoslavia to the United States, a cabinet minister and member of the Presidium of his country, personally appeared and testified at length in support of reciprocity [248 P.2d at 185], yet the judge on numerous occasions during the trial, again in his memorandum opinion and once again in his Findings expressed severely uncomplimentary views, some based on matters entirely outside the record, about Yugoslavia, its government and high officials [see 248 P.2d 189]. The District Court of Appeal reversed [248 P.2d 179] both on the evidence of reciprocity in fact and Article II of the U.S.-Serbian treaty of 1881 [22 Stat. 963] which, it was contended, provided for and guaranteed reciprocal inheritance rights between the two countries. However the California Supreme Court affirmed the Superior Court judgment, 41 C.2d 86, 257 P.2d 433, Mr. Justice Carter dissenting and adopting the District Court of Appeal opinion as his dissent [257 P.2d at 440]. [No. 344, Certiorari denied 346 U.S. 897, rehearing denied 347 U.S. 908].

In the later case of *Kolovrat v. Oregon*, 366 U.S. 187 (1961) it was held that Article II of the U.S.-Serbian treaty of 1881 [22 Stat. 963] does in fact provide for reciprocal inheritance rights and requires the states to grant nationals of Yugoslavia the same inheritance rights as United States citizens but it may hardly be supposed that this comforted the testator Arbulich's brother in Yugoslavia who was deprived of his inheritance, nor repaired the damage to the relations between the United States and Yugoslavia which must inevitably have resulted from the conduct of the probate judge and the subsequent decision of the California Supreme Court. It should be pointed out that at Arbulich's death in 1947 the California reciprocity statute [§ 259 of the Probate Code] was not only much milder than Oregon's § 111.070 with which we are here concerned but actually included a presumption in favor of reciprocity which was conclusive and which cast the burden to prove the contrary upon anyone challenging it.

Reference has heretofore been made (J.S. 14) to *State Land Board of Oregon v. Pekarek*, 234 Or. 74, 378 P2d 734 (1963) in which the Oregon Supreme Court affirmed a probate court decree escheating to the state of Oregon an estate consisting of a savings account in a Portland, Oregon, bank, left there by a citizen resident of Czechoslovakia who died in Czechoslovakia and whose heirs were a son and daughter living in Czechoslovakia. There were introduced in evidence a certificate assuring the existence of reciprocity by the Ambassador of Czechoslovakia to the

United States and the personal testimony of the embassy's First Secretary [234 Or. at 80] but the credibility of these witnesses was judged in light of "the fact that declarations of government officials in communist-controlled countries as to the state of affairs existing within their borders do not always comport with the actual facts" (J.S. 15). Can it be doubted for a moment that relations between the United States and Czechoslovakia must have suffered from this taking away by the State of Oregon of the inheritance of the Czechoslovak decedent's son and daughter, and from the Oregon court's reflection on the integrity of its high officials?

Very recently, on March 8, 1967, the California Supreme Court reversed [66 A.C. 74] a District Court of Appeal decision against reciprocity with Rumania in the *Chichernea Estate*, 244 A.C.A. 727, 53 Cal. Rptr. 535, (mentioned in J. S. 23). At this writing the California Supreme Court's opinion has not appeared in the reports but the clerk advises that the California Attorney General did not file a petition for rehearing, the time for which expired on March 23, 1967, so the decision has become final, just short of nine years after the testatrix' death on April 15, 1958. The Superior [probate] Court and the District Court of Appeal had ruled against reciprocity, denied the right to inherit of the testatrix' daughter, grandchildren, niece and son-in-law in Rumania and escheated the estate to the State of California.

For purposes here it is of interest that the Cali-

fornia Supreme Court rejected the construction of the reciprocity statute espoused by the state's Attorney General. He had contended that although the Legislature had in 1945 stricken from § 259 the requirement that an American heir have the right to receive payment within the United States of his foreign inheritance, such right was nevertheless required by reason of being an integral part of the right to take. This requirement is of course still in Oregon's § 111.070 (J. S. 6) as Section 1(1)(b) reading as follows:

"b. Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country."

Quoting from p. 36 of the mimeographed opinion in *Chichernea* as filed March 8, 1967:

"Entirely apart from the obvious impropriety of our interpreting section 259 so as to reintroduce into the statute a requirement expressly stricken by the legislature,⁴⁴ the construction espoused by the Attorney General would unsettle inheritance relations between California and many, perhaps even most, of the world's nations. The Rumanian law which is challenged as fatal to reciprocity in the present case⁴⁵ was a currency regulation imposed by the Fascist government of Rumania in 1941, in the setting of the Second World War. Nearly every nation in the world, including the United States, imposed such restrictions at that time. Few of these restrictions vanished with the end of the war; a major-

ity of nations preserved their currency regulations as they sought to rebuild their war-torn economies without unduly straining their balance of payments. Although Rumania revoked her ban (which was never more than discretionary) in 1959,⁴⁶ many nations still imposed discretionary, or in some cases absolute, restrictions upon the removal of estate proceeds. (See International Monetary Fund, Seventeenth Annual Report on Exchange Restrictions (1966).)

The restrictions vary widely in their terms, and many are obscurely phrased.⁴⁷ Surely this court cannot undertake to assess the nature and operation of all such restrictions in order to determine which are so onerous as to defeat reciprocity. For us to embark upon any such adventure *would gravely imperil the constitutionality of section 259 by involving our courts in matters of international monetary policy which may be within the exclusive province of federal authority.* (See *Ioannou v. New York* (1962) 371 U.S. 30 (Douglas, J., dissenting); *Kolovrat v. Oregon* (1961) 366 U.S. 187, 195-198; cf. *Clark v. Allen* (1947) 331 U.S. 503, 517.)

In any event, even if we were disposed to re-introduce into the statute *a possibly unconstitutional condition* expressly removed by our Legislature, we could hardly give that condition a more demanding construction than it bore when it was an express part of the Probate Code." (emphasis ours)

In *Estates of Larkin and Terry* (J.S. 22) 65 A.C. 49, 52 Cal. Rptr. 441 the court had previously expressed doubt of the constitutionality of the statute on another

point of construction espoused by the Attorney General. Quoting from 52 Cal. Rptr. at 488:

"Moreover, a construction of section 259 which would charge our courts with the duty of assessing the 'democracy quotient' of foreign states and the degree to which they pursue foreign policies consistent with our own would imperil the constitutionality of the statute."

Thereafter followed a discussion of *Clark v. Allen* and the language quoted at J.S. 23.

Thus the California Supreme Court has twice recently expressed concern over the constitutionality of the reciprocity statute if they were to construe it as the state's Attorney General urged. No doubt the court was mindful of Section 2 of § 259 as originally enacted in 1941 which contained the following emergency clause:

"A great number of foreign nations are either at war, preparing for war or under the control and domination of conquering nations with the result that money and property left to citizens of California is impounded in such foreign countries or taken by confiscatory taxes for war uses. Likewise money and property left to friends and relatives in such foreign countries by persons dying in California is often never received by such nonresident aliens but is seized by these foreign governments and used for war purposes. Because the foreign governments guilty of these practices constitute a direct threat to the Government of the United States, it is immediately necessary that the property and money of citizens dying in this country should remain in this country and

not be sent to such foreign countries to be used for the purposes of waging a war that eventually may be directed against the Government of the United States."

This is the statute which the Attorney General of the United States in his brief in *Bevilacqua's Estate* so aptly described as "not an inheritance statute, but a statute of confiscation and retaliation." (App. Br. in Opp. to Motion to Dismiss or Affirm, p. 4)

Oregon's 111.070, the statute with which we are here concerned, enacted in 1951 as a revision of the original reciprocity statute, Chapter 399, Oregon Laws 1937, is practically identical in its first two requirements with California's original PC 259 as enacted in 1941, so it is reasonable to assume that the Oregon Legislature was motivated by the same goal of protecting the state from the foreign nations intent on seizing inheritances from Oregon for "war uses" or "war purposes"—a protective function, clearly and exclusively, of the federal government, not of any state government. And Oregon went even a step further by adding to ORS 111.070 the requirement in Section 1(1)(c) that the foreign heir: (J.S. 6)

"may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries."

This, of course, is a very marked, important "change in conditions" as this requirement was not in the California statute before the Court in *Clark v. Allen*.

Clearly this would require the Oregon state courts, specifically in the first instance the probate courts, to examine into laws, decrees, regulations and other "acts of state" of foreign countries in violation of the doctrine laid down in *Underhill v. Hernandez*, 168 U.S. 250 (1897) at 252, quoted by Professor Louis Henkin in his treatise "The Foreign Affairs Power in the Federal Courts: Sabbantino" in 64 Columbia Law Review (1964) at page 807 as follows:

"Every sovereign state is bound to respect the independence of every other sovereign state and the courts of one country will not sit in judgment on the acts of the government of another done within its territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves,"

(App. Br. in Opp. to Motion to D. or A. p. 10).

While, from the standpoint of foreign relations, one may assume that Rumania is most gratified that the right of its nationals to inherit the Chichernea estate has at long last, and after years of most costly litigation, been vindicated, one may wonder at the impact on the relations between the United States and the U.S.S.R. of the fact that although in the Larkin and Terry estates, also the companion Yarovikoff estate [52 Cal. Rptr. 459] the right of the Russian heirs, again after years of most costly litigation, to inherit has been vindicated, only a few years previously the final decision was otherwise in *Gogabashvele's Estate*, 195 Cal. App. 2d 503, 16 Cal. Rptr. 77.

There the testator's niece and nephew in the U.S.S.R., issue of a predeceased sister who had been named sole beneficiary in his will, were held ineligible, on a ruling against reciprocity, to inherit their uncle's sizable estate. There the District Court of Appeal did precisely what the California Supreme Court declined to do in *Larkin*, that is analyze in great detail and at great length, obviously on basis of a most voluminous record, the governmental structure of the Soviet Union, the courts of the Soviet Union, Soviet law found to be discriminating against aliens, "Wills and Intestacy in the Soviet Union", "Lack of Legal Rights in the Soviet Union", "secret laws", "unrepealed obsolete laws", the "recognition of *ex post facto laws*", etc., all leading to the conclusion that reciprocity did not exist as of decedent's death on August 14, 1956. [Note—in *Larkin* and *Terry* the deaths occurred in 1960].

One of the greatest vices in the attempted state regulation of the inheritance rights of aliens is that there can never be a final determination in respect to any particular nation even within the single state, much less among several states or all of the reciprocity states. This is because, firstly, it is uniformly held that the date of death, when vesting and the determination of all rights occurs, governs and so the law of the foreign country must be ascertained and adjudicated as of the date, actually as of the hour or instant of death, as a foreign law, or decree, or regulation might have gone into effect, or been invalidated, at a particular time which might be deemed determ-

inative of whether or not reciprocity existed at the date, the moment of the estate leaver's death. Although all aimed at the same goal and purpose, there are variations in the reciprocity statutes of the several states, so there may be a ruling for reciprocity under the particular wording and requirements of the California but not the Oregon or Montana or the Iowa or the Nebraska statute. And, as Professor Berman so effectively points out in 62 Col. L. R. 257 [supra], there is the human element—the personal views, convictions, temperaments, prejudices of the judges, particularly at the first, the probate court level. And, as Chaitkin points out in 25 So. Calif. L. Rev. 297 [supra] the outcome is dependent largely on the size of the estate in question, since the foreign heirs to small estates, for that matter even to substantial estates, may not be able to obtain the services of expert witnesses, of lawyers experienced in this field of the law, and to pay the staggering costs of years of litigation.

Professor Albert A. Ehrenzweig of the University of California in his "Treatise on the Conflict of laws" (1962) at page 668 points to the "host of inconsistent decisions" brought on by the reciprocity statutes and says that "Only outright abolition of these objectionable statutes can eliminate this expensive and demoralizing confusion." But that is wishful thinking and there is no time for that, even if it were attainable. With numerous state legislatures presently in session, the grave danger of proliferation in reciprocity statutes exists. There is, however, a simple, direct, im-

mediately effective way to remedy the deplorable situation which has developed over the twenty years since *Clark v. Allen*, and that is to place the regulation of the inheritance rights of non-resident aliens, if there must be such regulation for the benefit and protection of the country as a whole, where it rightfully and lawfully belongs and of necessity must be, in the charge of the federal government. To leave it to the fifty individual states to enact legislation, and the courts of the fifty individual states to determine what aliens may and what aliens may not inherit, is to invite ever-widening chaos which must, inevitably, result in resentment towards, eventually in retaliation against, this nation on the part of the governments whose nationals are denied their traditional, age-old rights of inheritance.

As pointed out by appellants in the Jurisdictional Statement at page 21, and again in Appellants' Brief in Opposition to Motion to Dismiss or Affirm at page 9, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) clearly points the way. For the same reasons that this Court held there [at p. 427] that "the scope of the act of state doctrine must be determined by federal law," and New York was denied the right to impose its own exception upon the application of the doctrine, individual states may not impose their own conditions and requirements for allowing some foreign nationals to inherit, or prohibit some, but not all, aliens to inherit. As pointed out in fn. 25 on page 427, various constitutional and statutory provisions there cited reflect "a concern for

uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions." Reference is there made to "Comment, The Act of State Doctrine—Its Relation to Private and Public International Law", 62 Col. L. Rev. 1278, 1297, n. 123, also to *United States v. Belmont* and *United States v. Pink*. Reference has been heretofore made to Professor Henkin's discussion of "The Foreign Affairs Power of the Federal Courts: Sabatino" in 64 Col. L. R. 805. Both authors strongly support the doctrine that the states must yield and the branches of the federal government must have jurisdiction where the foreign relations of the United States are involved. Mr. Justice Douglas declared the same doctrine in his dissenting opinion in *Ioannou v. New York* where he said [371 U.S. at 32] that:

"Admittedly, the several states have traditionally regulated the descent and distribution of estates within their boundaries. This does not mean, however, that their regulations must be sustained if they impair the effective exercise of the nation's foreign policy."

It has, appellants respectfully submit, been clearly and amply demonstrated that Oregon's reciprocal inheritance rights statute, ORS 111.070 with which we are here concerned, and similar statutes in other states, such as California's Probate Code § 259, do impair the effective exercise of this nation's foreign policy as it concerns the "Iron Curtain" countries against whom said statutes are primarily and openly directed.

Each of the three requirements of ORS 111.070 compels the Oregon courts to inquire into and to sit in judgment on the ideology, the form of government, the laws, decrees, and other "acts of state" of the country in which the alien heir resides. If the court concludes that the constitution, inheritance laws, court decisions, etc., of the particular country do grant United States citizens rights of inheritance equal to those of their own citizens, thus satisfying the first requirement in Section 1(1)(a), the inquiry goes to the second requirement in 1(1)(b), which has nothing to do with reciprocity. The alien heir must show the court that United States Citizens have the right "to receive payment to them within the United States or its territories money originating from the estates of persons dying in such foreign country." This of course involves sitting in judgment on the foreign country's "acts of state" in the field of foreign exchange controls, management of its foreign valuta supplies, banking laws and regulations, and other facets of the country's fiscal structure, policies, and practices. In this connection the Oregon Supreme Court has repeatedly made it abundantly clear that in its view there can be no reciprocity with any foreign country which has in effect any form of foreign funds control—that is whose currency is not freely, completely and immediately convertible. Quoting from *Kasendorf's Estate* (1960) 222 Or. 463 at 479, 353 P.2d 531:

"If the American heirs had to depend upon the uncertainties of the exchange laws to receive payment of their inheritances in the United

States, we would feel compelled, as we were in the Christoff and Stoich estates, to deny claimant's right to take from the Kasendorf estate."

As the California Supreme Court pointed out in *Chichernea* at page 36, this requirement, that is the United States citizen's right to receive payment of his foreign inheritance within the United States:

"... which, because of widespread currency controls, would have precluded citizens of most foreign countries from participating in California estates was eliminated by amendment in 1945."

However it remains in ORS 111.070 to this day, and effectively closes the door to heirs in all of the "Iron Curtain" countries who do exercise foreign funds controls. Strictly and impartially applied it would also bar heirs in all countries whose currencies are not freely, completely and immediately convertible into dollars, even though their foreign funds control may be under International Monetary Fund membership and regulation.

The third requirement also calls for the Oregon courts to inquire into and sit in judgment on acts of state of foreign governments. Section 1(1)(c) demands proof that the foreign heir:

"may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries."
(emphasis ours)

In effect the foreign heir must prove a negative, that

is that his country does not wholly or partially confiscate his inheritance from Oregon. In *Pekarek's Estate*, 234 Or. 74, 378 P.2d 734 (1963), the Oregon Supreme Court, presumably in absence of any evidence of confiscation by the Czechoslovak government, concluded that Czechoslovakia's inclusion in Treasury Department Circular No. 655 was all that was necessary to make Czechoslovak heirs—and heirs in any other country on the list—ineligible to inherit in Oregon. As quoted from 234 Or. at 82 in J.S. 15:

“This official determination was operative at the date of decedent's death. We regard this official declaration as evidence that foreign beneficiaries would not receive their interests free from control amounting to, at least, a partial confiscation.”

Clearly, then, the Oregon reciprocal inheritance rights statute requires the Oregon courts to act in violation of, and they have in their reciprocal inheritance rights cases consistently violated, as shown by the decisions of the Oregon Supreme Court, two firmly settled principles of law, the act of state doctrine, as most recently declared in *Sabbatino*, and the prohibition, as declared in *Underhill v. Hernandez* [supra] against sitting in judgment on the acts of the government of another country done within its territory.

There are directly applicable to this case the principles of law involved and applied in *Cunard S. S. Co. v. Lucci*, 92 N.J. Super. 148, 222 A.2d 522, in which a state statute prohibiting the advertising of passage upon a vessel unless the advertising matter clearly in-

licated the country of the vessel's registry was held unconstitutional as it impinged on areas reserved to the Federal Government under the supremacy clause. Quoting briefly from 222 A.2d at 529:

"Primarily, the subject area sought to be affected by this legislation is national in scope, thereby necessarily requiring uniformity of regulation" [citing *Cooley v. Board of Wardens*, etc. 53 U.S. 299 (1851).]

and from p. 530:

"I further conclude that the statute in question also offends another area of federal pre-emption—the foreign affairs power. Clearly, that power is reserved to the federal Executive, and it, in conjunction with the supremacy clause, bars parallel state activity." [citing]

* * * * *

"The field of international affairs is one requiring sensitive and delicate negotiations. It should be obvious that *state action that might interfere* with the balance of international relationships could only serve to encumber hopelessly the prerogatives of both the Executive and Congress with respect to this subject matter; this must be regarded as so notwithstanding the good intentions of the legislature of any state. The legislatures of individual states or of the several states cannot determine foreign policy, nor can they provide interest groups or individuals with that right. The statute here under review seeks to speak in this forbidden area. It cannot be permitted to do so." (emphasis ours)

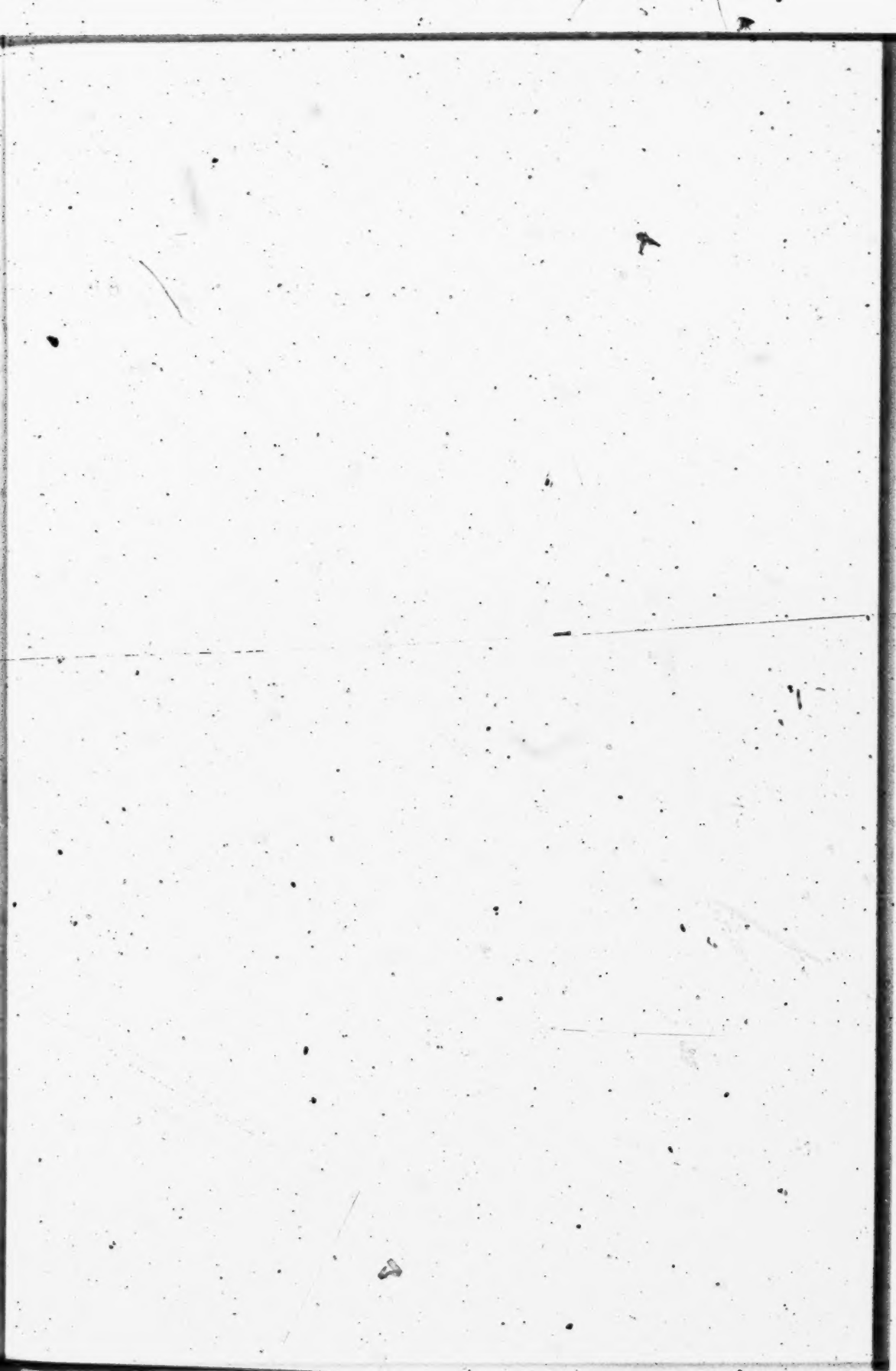
Every word of this applies directly to ORS 111.070, to

the attempts of individual states to lay down conditions which foreign nations must meet in order to qualify their nationals to inherit in those states. The mischief, the damage to the foreign relations of the United States which has been or *might* be done has been glaringly demonstrated. The potential for further mischief, for further intrusion by the states into the field of foreign relations in the future is limitless. This is an area which necessarily requires uniformity of regulation which can only be achieved by the Federal Government.

Substantial federal questions of the greatest and gravest public importance and urgency are presented in this case and appellants again pray that jurisdiction be noted and this case set for plenary consideration.

Respectfully submitted,

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GEORGE ZACHARIS, et al.

WILLIAM L. MILLER, Administrator, et al.

On Appeal From the Supreme Court of the
State of Oregon.

PETITION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE
and
BRIEF AMICUS CURIAE

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IN THE
Supreme Court of the United States

October Term, 1967

No. 21

OSWALD ZSCHERNIG, *et al.*,

Appellants,

vs.

WILLIAM J. MILLER, Administrator, *et al.*

On Appeal From the Supreme Court of the
State of Oregon.

**PETITION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE.**

Petitioners herein are attorneys at law duly admitted to practice in all of the state and federal courts in the State of California and are all admitted to practice before the Bar of the Supreme Court of the United States.

Petitioners have handled numerous cases in the state courts of the State of California involving the application and interpretation of the provisions of Probate Code §259 and the subsequent sections of the Probate Code of the State of California.

Probate Code §259 provides:

"The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposi-

tion, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this state by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. (Added Stats. 1941, c. 895, p. 2473, § 1, effective July 1, 1941, as amended Stats. 1945, c. 1160, p. 2208, § 1; Stats. 1947, c. 1042, p. 2443, § 1.)"

This section is commonly known as the Reciprocity Section of the California Probate Code and governs the rights of aliens to participate in the distribution of probate estates in the State of California.

The petitioners herein have been attorneys of record in two cases involving the interpretation and application of Section 259 of the Probate Code before the Supreme Court of the State of California; one of these cases involved heirs residing in the Union of Soviet Socialist Republics; the other case involved heirs residing in the People's Republic of Rumania.

In each of these cases your petitioners asserted on behalf of their clients the position that if a court was to hold on the facts of the case that reciprocal rights of inheritance did not exist between the United States and the country in which the heirs resided, then such ruling would be in violation of the United States Constitution and particularly Article I, Section 10, in that the statute constituted an unlawful invasion by the State of California of the exclusive power of the federal government to govern the foreign affairs of the United States.

The constitutional issue was raised at each level of the proceedings within the State of California but ultimately in *Estate of Larkin*, 65 A.C. 49, 52 Cal. Rptr. 441, 416 P. 2d 473, and *Estate of Chichernea*, 66 A.C. 74, 57 Cal. Rptr. 135, 424 P. 2d 687, the Supreme Court of the State of California determined that reciprocal rights of inheritance did exist between the United States and each of the countries involved. The court, herefore, never reached the ultimate constitutional question although the court raised serious questions as to the constitutionality of Probate Code 259 in the following language:

“Moreover, a construction of section 259 which would charge our courts with the duty of assessing the ‘democracy quotient’ of foreign states and the degree to which they pursue foreign policies consistent with our own would imperil the constitutionality of the statute. In *Clark v. Allen* (1946) 331 U.S. 503, 67 S.Ct. 1431, 91 L. Ed. 1633, the United States Supreme Court upheld the constitutionality of section 259 against a challenge that it represented a prohibited state venture

into the field of foreign affairs. The court rejected as 'farfetched' the contention of the challengers that the California Legislature had undertaken to stimulate foreign states to extend reciprocal inheritance rights to our citizens, a matter clearly within the exclusive competence of the federal government. The court considered that any effect which the statute might have on foreign countries was merely 'incidental.'

The commentators have seriously criticized the reasoning of the *Clark* decision. One writer declares that the court 'grossly underestimate[d] the effect of the California statute on foreign relations' and that the decision is inconsistent with prior and subsequent court rulings. (Boy, *The Invalidity of State Statutes Governing the Share of Nonresident Aliens in Decedents' Estates* (1963) 51 Geo.L.J. 470, 493-500; cf. Hawley, *Succession*, 1964 Annual Survey of American Law 585, 591.)

Similarly, Justice Douglas, himself the author of *Clark*, has declared that he believes the time has come to reconsider the rationale of that decision in light of the 'notorious' practice of certain state courts 'in withholding remittances to legatees residing in Communist countries' and thus affecting the foreign relations of this country in a manner not justified by any legitimate state interest in regulating the local aspects of inheritance. (*Ioannou v. New York* (1962) 371 U.S. 30, 83 S.Ct. 6, 9 L.Ed.2d 5, per curiam dismissal of appeal, Justices Douglas and Black voting to note jurisdiction, opinion by Justice Douglas.) Whatever the present status of the *Clark* decision, the construc-

tion of section 259 for which the Attorney General contends in the present case goes well beyond that deemed 'farfetched' in *Clark*."

Estate of Larkin, 65 A.C. 49, 52 Cal. Rptr. 441, 416 P. 2d 473.

The petitioners have pending in the state courts of California several cases involving heirs residing in foreign countries in which a challenge to the claim of the heirs has been made by the Attorney General of California or by private counsel on the ground of failure to comply with Probate Code 259. In each of such cases there looms constantly in the background the overriding question of the constitutionality of the California Probate Code Section.

Since the record before this court raises an issue as to the constitutionality of the Oregon statute and the determination of this issue by this court will seriously effect the interpretation of the California Reciprocity statute, Probate Code §259, your petitioners believe it of importance that the direct relevance of the court's ruling on the Oregon statute to Probate Code §259 in the State of California must be brought to the attention of this Honorable Court. Only by means of the attached Amicus Curiae Brief can the issues be properly brought before the court.

Your petitioners have sought the consent of the parties in the case before this court for the filing of the attached brief; we have received the written consent of Peter Schwabe, Esq., attorney for the appellant, but Wayne M. Thompson, Assistant Attorney General, representing Robert Y. Thornton, Attorney General of the State of Oregon, informed us that his office

was withholding its consent and requested that we obtain leave of the court to file our brief.

Because the time element is so short, we are attaching herewith our proposed brief together with this Motion for Leave to File the brief and respectfully request that leave of court be so granted and that the attached brief be filed in the case.

Dated: August 23, 1967.

Respectfully submitted,

SLAFF, MOSK & RUDMAN,

By EDWARD MOSK,

Amicus Curiae.

IN THE

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No. 21

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AMICUS CURIAE BRIEF.

I.

Interest of *Amicus Curiae*.

The interest of the *Amicus Curiae* in the subject matter of this case has been set forth in the Petition for Leave to file this *Amicus Curiae* Brief filed concurrently herewith and the statements set forth therein are incorporated herein by reference.

II.

Argument.

Probate Code §259 has as its sole Declared Legislative purpose the molding of the foreign policy of the United States.

The original California statute was enacted in 1941 as an emergency measure and the following statement of urgency accompanied its passage:

"A great number of foreign nations are either at war, preparing for war or under the control and domination of conquering nations with the result that money and property left to citizens of California is impounded in such foreign countries or taken by confiscatory taxes for war uses. Likewise money and property left to friends and relatives in such foreign countries by persons dying in California is often never received by such non-resident aliens but is seized by these foreign governments and used for war purposes. Because the *foreign governments guilty of these practices constitute a direct threat to the government of the United States*, it is immediately necessary that the property and money of citizens dying in this country should remain in this country and not be sent to such foreign countries to be used for the purposes of waging a war that eventually may be directed against the government of the United States (Cal. Stat. 1941 see 895, §2, page 2474)."¹ [Emphasis added.]

That the primary purpose of the statute is to govern and effect the foreign policy of the United States (and the foreign policy of other countries) is further clarified in the "Recommendation and Study Relating to the Right of Non-Resident Aliens to Inherit" prepared by the California Law Revision Commission in January 1959. This report was prepared in connection with suggested revisions of the California law. The report sets forth three policy reasons for the enactment of

this type of legislation. Suggested as the second and third reasons are:

"2. To prevent assets in the United States from falling into the hands of unfriendly nations.

"3. To *bring about policies in foreign nations* which would permit United States citizens to inherit property in those nations." [Emphasis added]

The California Law Revision Commission pointed out in connection with the third reason that "this is an interest which the federal government often seeks to advance by means of reciprocal treaty provisions establishing the inheritance rights of the citizens of one nation in estates in the other nation". (See California Law Revision Commission: Recommendation and Study Relating to the Rights of Non-Resident Aliens to Inherit, January 1959, B-19.)

It is difficult to conceive of a more strongly worded statement of the policy of the State of California showing the intent to effect the foreign relations of the United States.

The Commission in making its recommendation stated further at page B-5:

"Moreover, keeping American assets out of the hands of enemies or potential enemies is a function more appropriately performed by the United States Government. This responsibility is in fact being handled adequately by the Federal Government through such regulations as the Trading With the Enemy Act and the Foreign Assets Control Regulation of the Secretary of the Treasury."

Amicus Curiae herein is well aware of the decision in *Clark v. Allen*, 331 U.S. 503 (1946), but asserts

that to the extent that the issue presented herein was adequately before the court at the time of that decision, then *Clark v. Allen* is erroneous. It is submitted that the development of world trade, the increasing sensitivity of all actions taken by any governmental bodies in the world arena, the developments in communication and transportation, and even the proliferation of new nations since 1946 require a reexamination of the legal and factual foundations of *Clark v. Allen*.

There can be no question that the exclusive right to make treaties relating to the reciprocal rights of inheritance resides solely in the legislative and executive branches of the federal government. Certainly no state could enact legislation which contravenes the treaty making power of the federal government. (*Kolovrat v. Oregon*, 366 U.S. 187 (1961).) The failure of the federal authority to enter into a treaty defining the inheritance rights of American citizens in a particular country and the citizens of that country in the United States may itself be a federal policy determination not to be interfered with by the states.¹ For the State of California to attempt to pressure a foreign government (as the State of California admittedly seeks to do in the enactment of Section 259) is then clearly an act by the State of California to go over the head of the federal authorities and by its own legislation influence foreign governments in their attitudes and legislation relating to the citizens of California.

The seriousness of the issue is sharpened by the differences between the laws of the State of California and

¹See Boyd, *The Invalidity of State Statutes Governing the Share of Non-resident Aliens in Decedents' Estates*, 51 *Georgetown L.R.* 470, 511.

the State of Oregon. Thus a foreign country in order to be reciprocal with California need only treat California citizens in the same manner as they treat citizens of their own country in matters of inheritance; but to be reciprocal with Oregon the foreign country must go further and enact satisfactory legislation to the State of Oregon relating to the transfer of funds out of the country and must also meet the "use and benefit" requirements of Oregon.

Thus despite the fact that the Federal Constitution places the entire responsibility for determining foreign policy and treating with foreign countries in the hands of the federal government, in order to protect the inheritance rights of its citizens in the various states in the United States a foreign country must examine carefully and respond to the directives of each and every one of the fifty states of the United States in the field of inheritance. Placing this burden upon foreign countries immediately affects adversely the foreign relations power of the federal government, in that it can no longer be said that that power and right rests exclusively in the federal government.

Many nations have their own reciprocity provisions in matters of inheritance,² currency regulations, and other fields. If each of the fifty states of the United States can enact legislation requiring a particular type of action by the foreign country, how can the foreign country apply its own principles of reciprocity with regard to the United States? Must the citizens of California lose their right of inheritance in Hungary because Hungary determines that the United States is not

²See for example Hungary (Law in Eastern Europe, ed. Z. Szirmai, #5, The Law of Inheritance in Eastern Europe, p. 180.

practicing reciprocity so long as Oregon retains on its books a more restrictive alien inheritance law? Yet such a result is quite possible if each state is permitted to establish its own "foreign policy" in matters of inheritance.

Amicus Curiae represents many aliens in the California courts and have matters pending foreign courts on behalf of citizens of California. A determination that the Oregon statute is constitutional could adversely affect the rights of California citizens abroad by reason of the restrictions on the rights of aliens in Oregon; and counter actions against American citizens because of Oregon law in some foreign country in matters of inheritance could ultimately cause California courts to declare that nation non-reciprocal with California. The mere stating of this proposition makes clear that the Oregon statute (and all state reciprocity statutes including Probate Code §259 of California) unconstitutionally impinge on the exclusive foreign relations power of the Federal Government.

III.

Conclusion.

The world of 1946 when *Clark v. Allen* appeared to approve individual state reciprocity statutes no longer exists. Since that time we have had a proliferation of nations, an increase in trade and commerce, a development of interchange of populations and a recognition of the fact that all actions taken by countries in any field of the law which effect the citizens of the other country can have serious and long range effects on the foreign policy of the United States. More than one war (hot or cold) has resulted from the actions of individual countries vis-a-vis the citizens of another country.

Large transfers of populations have occurred and refugees have moved from one country to another with not an insubstantial number of such refugees ending up in the United States.

In this shrinking world to give the power to affect foreign relations to each of the fifty states can prove disastrous to the foreign relations prerogative of the federal government and fortunately also runs counter to the exclusive power granted to the federal government by the United States Constitution. (Article I, §10.)

For this reason *Amicus Curiae* urges this court to find in accordance with the position asserted by the appellant from Oregon that the Oregon statute is unconstitutional in that it impinges on the exclusive foreign relations power of the federal government.

Respectfully submitted,

SLAFF, MOSK & RUDMAN,

By EDWARD MOSK,

Amicus Curiae.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 21

OSWALD ZSCHERNIG, ET AL., APPELLANTS

v.

WILLIAM J. MILLER, ADMINISTRATOR, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE
OF OREGON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Supreme Court of Oregon (R. 14-34) is reported at 243 Or. 567, 412 P. 2d 781, rehearing denied, 415 P. 2d 15. The opinion, findings and order of the Circuit Court of Multnomah County, Oregon (R. 9-13) are unreported.

JURISDICTION

The opinion and order (R. 34-35) of the Supreme Court of Oregon were issued on March 23, 1966, and a petition for rehearing was denied on June 3, 1966 (R. 35-36). Notice of appeal to this Court was filed on August 31, 1966 (R. 37-39).

On January 9, 1967, this Court invited the Solicitor General to file a brief expressing the views of the United States (385 U.S. 998). Probable jurisdiction was noted on May 8, 1967 (R. 40) (386 U.S. 1030). The jurisdiction of this Court rests upon 28 U.S.C. 1257(2).

QUESTION PRESENTED

Whether Article IV of the 1923 Treaty of Friendship, Commerce and Consular Rights between the United States and Germany confers upon nationals of one of the signatories the right to succeed to personal property located in the other country regardless of the nationality of the decedent.

STATUTE AND TREATY INVOLVED

The relevant provisions of the Oregon Revised Statutes, and the 1923 Treaty of Friendship, Commerce and Consular Rights between the United States and Germany are set forth in Appendix A, *infra*, pp. 16-17.

STATEMENT

Pauline Schrader, a resident of Oregon, died in that State on September 30, 1962, leaving an estate consisting of real and personal property located in Oregon. She was intestate and her sole heirs were appellants, residents of the Soviet Zone of Germany (East Germany). Acting pursuant to Section 111.070 of the Oregon Revised Statutes, appellee State Land Board of Oregon filed a petition in the probate department of the Circuit Court of Multnomah County for the escheat of the decedent's estate. Thereafter, appellants filed in that court a petition to determine their heir-

ship and to obtain distribution of the estate (R. 1-9).

Following a hearing, the circuit court found, among other things, that the evidence before it "did not establish the existence of reciprocity of inheritance rights as required by ORS 111.070 with respect to the German Democratic Republic of East Germany at the date of death of Pauline Schrader" (R. 12).¹ Accordingly, the court ordered that all property of the estate escheat to Oregon (R. 13).

The Supreme Court of Oregon modified that order of escheat so as to apply only to the decedent's personal property (R. 34-35). The court ruled that the right of residents of East Germany to inherit real property situated in the United States was guaranteed by Article IV of the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany, *infra*, p. 17, and that the Oregon statute could not therefore, operate to bar the right of appellants to inherit the realty (R. 31). The court concluded that Article IV survived World War II and was not affected by the 1954 Treaty of Friendship, Commerce and Navi-

¹ The Oregon statute conditions a non-resident alien's right to inherit property in Oregon upon (a) the existence of a reciprocal right of American citizens to inherit upon the same terms and conditions as citizens of the country of which the alien heir is an inhabitant or citizen, (b) the right of American citizens to receive payments within the United States from the estates of decedents dying within such foreign country, and (c) proof that the alien heirs of the American decedent will receive the benefit, use or control of their inheritance without confiscation. The statute places the burden on the alien heir to prove that all of the conditions are met. If these conditions are not satisfied, and there are no other heirs, the property is to escheat to the State. See Appendix A *infra* pp. 16-17.

gation with the Federal Republic of Germany (West Germany), 7 U.S.T. & O.I.A. 1839, TIAS No. 3593 (effective July 14, 1956) (R. 19-28).

As to the personal property, however, the Supreme Court of Oregon held, relying on *Clark v. Allen*, 331 U.S. 503, that Article IV of the 1923 Treaty did not cover "personal property located in this country which an American national undertakes to leave to German nationals" (R. 30).² It thus concluded that the circuit court had correctly applied the provisions of Oregon Revised Statutes Section 111.070 with respect to the decedent's personalty (R. 30). It also ruled that the Oregon statute was not "an unconstitutional attempt by the state to invade the exclusive power of the federal government to regulate the foreign relations of the United States" (R. 30-31).

INTRODUCTION AND SUMMARY OF ARGUMENT

From the foregoing Statement, it is apparent that the disposition of this case will necessarily involve the interpretation of Article IV of the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany. While this particular treaty now applies only to the Soviet Zone of Germany (having been superseded as to the Federal Republic of Germany by a 1954 Treaty), identical provisions are contained in six other treaties to which the United States is a party,³ and similar provisions are contained in four

² The Oregon court presumed, in the absence of a showing to the contrary, that the decedent was a United States citizen at the time of her death (R. 30, note 5).

³ Treaty of Friendship, Commerce and Consular Rights with Austria, 47 Stat. 1876; TS 838, Art. IV (1928); Treaty of Friendship, Commerce and Consular Rights with Estonia, 44

other treaties presently in force.⁴ In *Clark v. Allen*, 331 U.S. 503, this Court, ~~although it~~ recognized that the 1923 Treaty gave German nationals the right to inherit real property regardless of the nationality of the decedent; however the Court construed ~~the~~ personal property provision at issue here to give German nationals the right to inherit personal property from German nationals residing in this country but not from United States citizens. We urge a more liberal construction—one which would permit German nationals to inherit personal property regardless of the citizenship of the decedent and would avoid discrimination in the disposition of decedents' property against foreign nationals whose rights are secured under this or similar treaties. We believe that there is no sound basis for assuming that the drafters of the treaty intended to distinguish between the right to inherit real property and the right to inherit personal property, and that the history of the provision in issue points to the conclusion that the drafters did not intend such a result. We also

Stat. 2379, TS 736, Art. IV (1925); Convention relating to the Tenure and Disposition of Real and Personal Property with Guatemala, 32 Stat. 1944, TS 412, Art. II (1901); Treaty of Friendship, Commerce and Consular Rights with Honduras, 45 Stat. 2618, TS 764, Art. IV (1927); Treaty of Friendship, Commerce and Consular Rights with Latvia, 45 Stat. 2641, TS 765, Art. IV (1928); and Treaty of Friendship and General Relations with Spain, 33 Stat. 2105, TS 422, Art. III (1902).

⁴Treaty of Peace, Friendship, Commerce and Navigation with Bolivia, 12 Stat. 1003, TS 32, Art. XII (1858); Treaty of Peace, Amity, Navigation, and Commerce with Colombia (then New Granada), 9 Stat. 881, TS 54, Art. XII (1846); Consular Convention with Sweden, 37 Stat. 1479, TS 557, Art. XIV (1910); and Convention of Friendship, Commerce and Extradition with Switzerland, 11 Stat. 587, TS 353, Art. V (1850).

contend that there is no reason to assume that the drafters of this treaty intended to adopt the narrow construction of this provision found in this Court's opinion in *Frederickson v. Louisiana*, 23 How. 445. Thus, the provision in question should be interpreted in accordance with the generally accepted principle that treaties of friendship and commerce should be construed to avoid injurious discrimination in either country against the citizens of the other.

ARGUMENT

The 1923 Treaty gives nationals of either country the right to inherit personal property regardless of the nationality of the decedent

There is no question that the decision of the Supreme Court of Oregon is in accord with this Court's decision in *Clark v. Allen*, 331 U.S. 503. It is the position of the United States, however, that, with regard to the construction of the personal property clause of the treaty in issue, *Clark v. Allen* was incorrectly decided and should be overruled.*

The treaty at issue here and in *Clark v. Allen* treats the disposition at death of real and personal property in separate provisions. Thus, the treaty provides (see App. A, *infra*, p. 17):

Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Con-

*The government does not challenge the Court's holdings in *Clark v. Allen*, that the Treaty of 1923 is still in force, and that State escheat statutes, such as the Oregon statute, can not be enforced if the foreign national's rights are guaranteed by treaty. Nor does the government contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations.

tracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.

We agree with the Court's determination in *Clark v. Allen* that the provision dealing with real property gives German heirs the right to inherit realty from "any person" holding realty in the United States" (331

U.S. at 508). However, we question the distinction, drawn in *Clark v. Allen*, between the right to inherit real property and the right to inherit personal property. Indeed, we perceive no reason why the drafters of this treaty would have desired to adopt a rule which permits a foreign national to inherit from an American citizen who died possessed of realty, but denies the foreign national the right to inherit if prior to his death the citizen sold the realty and retained the cash proceeds of that sale. The anomaly of such a construction is even more striking when it is recognized that the treaty does not give the foreign national the right to take title to the realty but rather permits him to have the realty sold and to obtain the proceeds of the sale.

We suggest that the history of this provision,⁶ which was presented to the Court in detail by the government's brief in *Clark v. Allen* (reproduced as Appendix B, *infra*), supports the conclusion that the drafters of this provision had no such distinction in mind.

⁶ Article IV of the 1923 Treaty is based upon Article X of the 1785 Treaty with Prussia (8 Stat. 84, 88). Article X appears as Article X of the Renewal Treaty of July 11, 1799 (8 Stat. 162, 166) and was again copied as Article XIV of the Treaty of May 1, 1828 (8 Stat. 378, 384). At the time of the ratification of the 1923 Treaty, Secretary of State Hughes wrote to Senator Lodge, Chairman of the Senate Committee on Foreign Relations, that:

"Comment regarding Article IV of the new draft is believed to be unnecessary except to call attention to the similarity of this Article to Article XIV of the Treaty with Prussia [of May 1, 1828]."

Letter dated January 17, 1924, Dept. State File 711.622/36, MSS., Nat'l. Archives.

At common law, aliens could freely inherit personal property, but were not entitled to hold or to succeed to real estate. 1 Blackstone, *Commentaries* 372; 2 Kent, *Commentaries* 61-63. Because the United States did not wish to abrogate the common-law rule that aliens could not hold title to real property, but was willing to grant alien heirs the right to have real property in an estate sold and to obtain the proceeds of that sale, it was necessary to treat the disposition of real property in a provision separate from the provision dealing with personal property. See Appendix B, *infra*, pp. 21-22.

Since there was no common-law rule preventing aliens from succeeding to personal property, that provision of the treaty was drawn with an eye to the substantial restrictions, existing in many of the civil law countries, upon an alien's right to dispose of, or to inherit, property of any kind. The *droit d'aubaine* was the feudal right of the sovereign to appropriate all the property of an alien dying, either testate or intestate, within the realm. An aspect of this doctrine was "the complementary incapacity of an alien to inherit, even from a citizen." *Nielsen v. Johnson*, 279 U.S. 47, 55, note 2. See also III Vattel, *The Law of Nations* 112; Wheaton, *Elements of International Law* (1866 ed.) 82. The *droit d'aubaine* was replaced during the 18th century by the *droit de détraction*, a tax "imposed on the right of an alien to acquire by inheritance (testate or intestate) the property of persons dying within the realm." *Nielsen v. Johnson*, *supra*, at 56, n. 2. The tax was levied upon the removal of property inherited by an alien from the country of

which the decedent was a citizen. Borchard, *Diplomatic Protection of Citizens Abroad* (1915 ed.) 39.⁷

The personal property provision of Article ~~VI~~ ^{IV} of the treaty in issue was originally drafted with a view to relieving citizens of the contracting countries from the onerous burdens of the *droit d'aubaine* and the *droit de detraction*. Thus, in order clearly to prohibit the application of the *droit d'aubaine*, by which the sovereign could appropriate the property of a deceased alien, the provision in issue provides that "[n]ationals of either High Contracting Party may have full power to dispose of their personal property * * * by testament, donation, or otherwise." Then, in order to protect against the enforcement of the *droit de detraction's* discriminatory taxation of the inheritance of an alien, the provision continues: "their heirs, legatees and donees, of whatsoever nationality * * * shall succeed to such personal property * * * subject to the payment of such duties * * * only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases." Since the two clauses served different functions, there is no reason to limit the second clause to cases encompassed by the first.

We find nothing in the relevant history to indicate that the drafters intended to withhold from foreign nationals the right to inherit personal prop-

⁷ According to Borchard, "[t]he power to acquire, own and dispose of personal property" was "a universally recognized right of aliens," often guaranteed by treaty provisions similar to the one here involved. *Ibid.* See also II Hyde, *International Law* (2d revised ed.), pp. 22-29.

erty from citizens, or to suggest that there was any intent to distinguish between the right to succeed to real and personal property. Indeed, as is documented in the government's brief in *Clark v. Allen*, *infra*, pp. 23-30, those who drafted the treaties which originally incorporated this provision assumed that they were assuring foreign nationals the right to inherit real or personal property from any person dying in this country. Thus it is apparent that the word "their" before "heirs" in the second clause of the personal property provision was meant to refer to "Nationals of either High Contracting Party"* and that the word "such" before "personal property" in the same clause refers to "personal property of every kind."*

In *Clark v. Allen* the Court acknowledged that the "history of the clause * * * bears out the construction that it grants the foreign heir the right to succeed to his inheritance * * *." 331 U.S. at 515. However, that construction was rejected on the basis of the 1860 decision in *Frederickson v. Louisiana*, 23 How. 445, in which the Court had construed an identical pro-

* As noted above, the full provision reads:

"Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases."

vision in the Treaty of 1844 with Wurttemberg (8 Stat. 588) as not giving foreign heirs the right to inherit personal property from United States citizens, and three 1917 cases which had followed *Frederickson-Peterson v. Iowa*, 245 U.S. 170; *Duus v. Brown*, 245 U.S. 176; *Skarderud v. Tax Commission*, 245 U.S. 633.⁹ The Court, in *Clark v. Allen*, reasoned that "the consistent judicial construction of the language since 1860 has given it a character which the treaty-making agencies have not seen fit to alter." 331 U.S. at 516.

Implicit in the Court's reasoning were the assumptions (1) that the drafters of the provisions in question were aware of the decision in *Frederickson v. Louisiana*, and (2) that they construed *Frederickson* as barring foreign nationals from inheriting personal property from United States citizens under the treaty in question. We submit that both of those assumptions are doubtful.

As to the first, it should be noted that in 1895 the British Ambassador in Washington initiated correspondence with the State Department proposing a treaty which would give citizens of each country reciprocal rights to the inheritance of "real or personal" property. The treaty that was subsequently adopted contained a provision dealing with personal property almost identical with the Wurttemberg Treaty. Thus, it seems that the drafters of that treaty were not cognizant of the *Frederickson* decision. See Appendix B *infra*, pp. 37-41.

⁹ Although these cases followed *Frederickson*, they did not involve identically worded treaty provisions.

In addition, the *Frederickson* decision could conceivably have been construed by the drafters of the 1923 German Treaty as not being applicable to the treaty which they drafted. The Court in *Frederickson* was concerned solely with the article of the Wurttemberg Treaty dealing with personal property; the provision dealing with real property was not brought to the Court's attention. As a result, the Court in *Frederickson* based its decision that foreign nationals had no right to inherit personal property from United States citizens on its understanding that (23 How. 447-448):

* * * The case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other, *was not in the contemplation of the contracting Powers*, and is not braced in this article of the treaty. * * * [Emphasis added.]

Since the provision dealing with real property in the Wurttemberg Treaty (which was identical to the one in the treaty in issue here) accorded the nationals of either country the right to inherit the real property "of 'any person' holding realty in the United States" (see *Clark v. Allen*, 331 U.S. at 508), the Court in *Frederickson* was clearly in error in concluding that "the case of a citizen * * * residing at home and disposing of property * * * was not in the contemplation of the contracting Powers * * *." The Court, in *Frederickson*, did not realize that it was creating a distinction between the right to inherit real property and the right to inherit personal property.

Just as the Court in *Frederickson* was misled by not having the full treaty before it, the drafters of the treaty here in issue could have been misled by a failure to realize that the treaty involved in *Frederickson* did contain provisions pertaining to both real and personal property. Thus, the drafters of the treaty at issue here might have concluded that because the real property provision did affirmatively show that the case of a citizen at home disposing of his property was "in the contemplation of the contracting Powers," the personal property clause would not be governed by the reasoning of *Frederickson*.

No analysis of the history of the 1923 Treaty can definitively determine whether the drafters considered *Frederickson* or how they construed it. We do urge, however, that the above analysis does at least cast considerable doubt on the assumption that they thought or intended that the provision here in issue would be controlled by *Frederickson*. In these circumstances, we suggest that the Court should not consider itself bound to follow *Frederickson* and to reject the settled principle that "where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred." *Bacardi Corp. v. Domenech*, 311 U.S. 150, 163, citing *Jordon v. Tashiro*, 278 U.S. 123, 127; *Nielsen v. Johnson*, 279 U.S. 47, 52.

The introduction to the treaty in issue here states the purpose of the contracting powers "to promote friendly intercourse * * * through provisions responsive to the spiritual, cultural, economic and commercial aspirations of the peoples thereof" (44 Stat.

2132). A construction of that treaty which permits the States to discriminate against foreign nationals in regard to their right to inherit personal property from United States citizens seems clearly at odds with that purpose. See *Todok v. Union State Bank*, 281 U.S. 449, 455. "It is not in such a niggardly fashion that treaties designed to promote the freest kind of traffic, communications and associations among nations and their nationals should be interpreted * * *." *Kolovrat v. Oregon*, 366 U.S. 187, 194.¹⁰

CONCLUSION

For the reasons stated, it is respectfully submitted that the order of the Supreme Court of the State of Oregon should be reversed in so far as it determined that appellants were not decedent's heirs at law with respect to her personal property.

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AUGUST 1967.

¹⁰ If the Court concludes that the 1923 Treaty gives appellants the right to inherit the personal property, it need not consider any of appellants' constitutional challenges to Oregon Revised Statutes, Section 111.070 (R. 38-39). In the event that the Court considers those challenges, we note here, as observed above, see note 5, *supra*, that the government does not contend that the application of Oregon Revised Statutes, Section 111.070 to the facts of this case constitutes an undue interference with the conduct of the foreign relations of the United States.

APPENDIX A

STATUTE AND TREATY INVOLVED

1. Section 111.070 of the Oregon Revised Statutes provides as follows:

(1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:

(a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such alien is an inhabitant or citizen;

(b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and

(c) Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.

(2) The burden is upon such nonresident alien to establish the fact of existence of the reciprocal rights set forth in subsection (1) of this section.

(3) If such reciprocal rights are not found to exist and if no heir, devisee or legatee other than such alien is found eligible to take such

property, the property shall be disposed of as escheated property.

2. Article IV of the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany, signed December 8, 1923, proclaimed October 14, 1925, 44 Stat. 2132, 2135, T.S. No. 725, provides as follows:

Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.

APPENDIX B

Pp. 39-67 of the Brief For The Petitioner in *Clark v. Allen*, 331 U.S. 503.

1. *History of the treaty clause prior to Frederickson v. Louisiana*.—Together with a large number of other treaties, the instant treaty is based on Article X of the treaty of 1785 with Prussia. See n. 17, *supra*. The Prussian treaty, in turn, evolved from the earlier treaties of amity and commerce with France, The Netherlands and Sweden. The diplomatic correspondence for all of these treaties shows that the reciprocal inheritance clause now before the Court has always been understood as providing for inheritance rights without regard to the citizenship of the decedent. In view of the relationship of the instant treaty to these earlier treaties, this evidence may be relied upon here. *Nielsen v. Johnson*, 279 U.S. 47, 52; *Factor v. Laubenheimer*, 290 U.S. 276, 294-95 *In re Ross*, 140 U.S. 453, 467; *Perkins v. Elg*, 307 U.S. 325, 335; *Wildenhus's Case*, 120 U.S. 1.

a. *The treaties with France, The Netherlands and Sweden*. Our first treaty of amity and commerce, that of February 6, 1778, with France, contained a clause directed specifically at the *droit d'aubaine* and the *droit de detraction*. Art. XI, 8 Stat. 12, 18.²⁵ In our second and third

²⁵ "The subjects and inhabitants of the said United States, or any one of them, shall not be reputed aubains in France, and consequently shall be exempted from the *droit d'aubaine* or other similar duty under what name soever. They may by testament, donation, or otherwise, dispose of their goods moveable and immoveable in favour of such persons as to them shall seem good, and their heirs, subjects of the said United States, residing whether in France or elsewhere, may succeed them *ab*

treaties of amity and commerce, with The Netherlands and Sweden, a more general clause, closer in phraseology to the personalty clause of the later treaty with Prussia, provided for the inheritance of both real²⁶ and personal property, without qualification. Art. VI, Treaty of October 8, 1782, with The Netherlands (8

intestat, without being obliged to obtain letters of naturalization, and without having the effect of this concession contested or impeded under pretext of any rights or prerogatives of provinces, cities, or private persons; and the said heirs, whether such by particular title, or *ab intestat*, shall be exempt from all duty called droit de detraction or other duty of the same kind, * * * The subjects of the most Christian King shall enjoy on their part in all the dominions of the said States, an entire and perfect reciprocity relative to the stipulations contained in the present article."

²⁶ These treaties used the words "effects" and "goods," which have been held to include realty. *Todok v. Union State Bank*, 281 U.S. 449; *University v. Miller*, 14 N.C. 188; *Adams v. Akerlund*, 168 Ill. 632; *Contra: Johnson v. Olson*, 92 Kan. 819; *Succession of Sala*, 50 La. Ann. 1009. See 2 Miller, *Treaties*, etc. 150.

On the ground, *inter alia*, that the inclusion of real property would encroach on the powers of the States, it was proposed in the Congress to limit the treaty with The Netherlands to personalty. XXII Journals of the Continental Congress (1914) 374, 375-376, 393-396. While the proposal was voted down, the committee of the Congress which recommended ratification of the treaty was pleased that the final form of the treaty used the term "effects" rather than the explicit language "goods, moveable or immoveable". The committee apparently hoped that "effects" would not be taken to include realty. XXIV *ibid.* (1922) 64, 65. See 1 Curtis, *Constitutional History of the United States* (1889) 188-190. A proposal to limit the treaty with Sweden to personalty was also made. The grounds do not appear and the proposal was either voted down or otherwise abandoned. XXIII Journals of the Continental Congress (1914) 622, 623.

scope of the treaty-making power of the Confederation²⁹ the Continental Congress, however, instructed its Commissioners, Franklin, Jefferson and Adams (XXVI Journals of the Continental Congress (1928), 357, 360-361):

That no rights be stipulated for aliens to hold real property within these States, this being utterly inadmissible by their several laws and policy; but where on the death of any person holding real estate within the territories of one of the contracting parties, such real estate would by their laws descend on a Subject or Citizen of the other were he not disqualified by alienage, there he shall be allowed a reasonable time to dispose of the same, and withdraw the proceeds without molestation.³⁰

²⁹ See n. 26, *supra*.

³⁰ When this instruction was presented to the Prussians, they expressed a preference for their original proposal, on the ground, *inter alia*, that the original had reciprocally exempted the nationals of the two countries from the *droit de detraction*, presumably without qualification. Letterbook of the Commissioners, 116 Papers of the Continental Congress, p. 166, MSS., Library of Congress.

The American Commissioners explained that the revision was attributable to the policy of the common law (2 *Diplomatic Correspondence of the United States, 1783-1789* (1833), 269, 274):

"By the laws of the United States, copied in this instance from those of England, aliens are incapable of holding real estate. When an estate of that nature descends to an alien, it passes on by escheat to the State; the policy of the United States does not permit the giving to the subjects of any other power a capacity to hold land within their limits, which was proposed by the project formerly delivered to Mr. Adams. But they are perfectly willing to relieve such persons from all loss on this account, by permitting them to sell the inheritance and withdraw the proceeds without any detraction."

Article X of the Treaty, as drafted by the Commissioners (Letter Book of the Commissioners, 116 Papers of the Continental Congress, pp. 66, 74, MSS., Library of Congress), reproduced the instruction from the Continental Congress as an exception to the clause providing for reciprocal inheritance of "personal goods," which thenceforth was limited to personalty. Article X provided, in substantially the same language as Article IV of the instant treaty of 1923, as follows (8 Stat. 84, 88):

The citizens or subjects of each party shall have power to dispose of their personal goods within the jurisdiction of the other, by testament, donation or otherwise and their representatives, being subjects or citizens of the other party, shall succeed to their said personal goods; whether by testament or *ab intestato*, and may take possession thereof either by themselves or by others acting for them; and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein the said goods are, shall be subject to pay in like cases. * * * And where, on the death of any person holding real estate within the territories of the one party, such real estate would by the laws of the ~~land~~ descend on a citizen or subject of the other, were he not disqualified by alienage, such subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all rights of deduction on the part of the government of the respective states.

It will be noted that the first sentence of this Article, which contains the clauses governing the disposal and inheritance of "personal goods", is based on the corresponding language

of the earlier Dutch and Swedish treaties (p. 42, notes 27, 28, *supra*) with the addition, in the clause governing disposal, of the phrase "within the jurisdiction of the other". This phrase appears here for the first time and nothing bearing on its intended significance has been found. Its function seems to have been to define more precisely than did the Dutch and Swedish treaties the case in which *disposition* of property required protection from the *droit d'aubaine*, i.e., the case of disposition of property located in a country other than that of the citizenship of the owner. The phrase was unrelated to the problem of the extent to which rights of succession were to be granted, free from the *droit de detraction*, and cannot be said to have restricted such rights. Indeed, the terms of the real property clause, also newly-introduced, affirmatively suggest that the personal goods clause was intended to grant the right to inherit personal property from both alien and citizen decedents.

In the absence of the new clause explicitly dealing with real property, the reference to "personal goods" would have included both real and personal property. See p. 41, n. 26, *supra*. The real property clause was, therefore, a deliberate limitation on the scope of the rights to real property granted in the earlier treaties—a substitution of a right to proceeds for the right to take and hold title to real property. The substituted right clearly applied, however, to inheritance from both citizen and alien. The language explicitly comprehended inheritance from "any person holding real estate." It has never been suggested that this language does not guarantee the right to inherit from citizens³¹ and

³¹ The question has never been raised in the many cases construing the realty clause (see pp. 30-32, *supra*) and the opin-

such a suggestion would have been startling to the members of the Congress who, being familiar with the common law incapacity of the alien to own real property, no doubt had in mind only the cases of inheritance from citizen owners. See n. 30, *supra*.²² The real property clause was, then, a limitation on what would otherwise have been the effect of the "personal goods" clause, a limitation, however, which broadly included both the cases of citizen and alien decedents. The Congress which drafted this limitation must, therefore, have believed that the clause for the inheritance of personal goods had the same effect and applied equally to inheritance from citizen and alien.

c. *The Treaties with the German States, 1840-1850*.—This understanding—that the personality clause applied to all heirs, whether of citizen or alien decedents—was repeatedly expressed during the period in the nineteenth century in which treaties incorporating Article X were being actively negotiated with a large number of countries. In the eighteen forties, similar treaties were negotiated by Henry Wheaton, then Minister to Prussia, with the German states of Bavaria, Hesse, Wurttemberg, Nassau and Saxony. See 4 Miller, *Treaties and Other International Acts of the United States of America* (1934), 546; Appendix C, p.

ions frequently do not mention the citizenship of the decedent. In several cases, however, it appears that the decedent was an American citizen. *Colson v. Carlson*, 116 Kan. 593; *Goos v. Brocks*, 117 Neb. 750; *Opel v. Shoup*, 100 Ia. 407; *Techt v. Hughes*, 229 N.Y. 222, certiorari denied, 254 U.S. 643; *Dockstader v. Kershaw*, 4 Pennewill (Del.) 398.

²² This incapacity had at that time been modified only by the treaties with France, The Netherlands and Sweden, under which aliens might have become the owners of real property by virtue of inheritance.

93. In these treaties the clauses relating to realty and personalty were for the first time set out in separate paragraphs.

In requesting authority to conclude these treaties, Mr. Wheaton described the purpose and desirability of reciprocal inheritance treaties as follows (Despatch, Wheaton to Legaré, June 14, 1843, 3 Despatches, Prussia, No. 226, MSS., Nat. Archives; see 4 Miller, *Treaties, etc., supra*, at 547-548):

These odious prohibitions & taxes on the acquisition & transfer, by the citizens & subjects of one country of property situated in another, or on the sale of their property by the citizens & subjects of one country emigrating to another, which originated in the barbarous ages of the feudal system, when man was chained to the soil on which he grew, have been almost universally abolished by compact, & the common consent of most civilized nations. Almost every commercial Treaty, concluded by the United States with foreign Powers, contains a stipulation for that purpose. It is a matter of very considerable importance with respect to our intercourse with Germany, & the vast emigration constantly going on from this country to the U. States. In all the German States, where it is not otherwise provided by Treaty, a tax is levied on all property sold, & the proceeds of which are carried out of the country by Emigrants, which amounts, in most instances, to ten *per centum* on the capital thus transferred. That amount would consequently be gained to the U. States by the proposed stipulations; & I cannot perceive that we should lose more than we should gain by the free disposition of

property by testament or inheritance, on both sides; as, if there be many cases accruing of persons dying in the U. States, & leaving heirs in Germany, there are also probably as many cases of naturalized Germans, resident in the U. States, who are entitled to inherit the property of their relations deceased in Germany.

Mr. Wheaton speaks of the "odious prohibitions on the *acquisition* & transfer" by citizens of one country of property situated in another and states that almost every commercial treaty concluded by the United States contains a stipulation for abolishing these prohibitions and taxes. This statement, taken with his explanation of what we stood to lose or gain by such treaties, shows that he neither understood the existing treaties to limit the inheritance of personalty nor did he propose to conclude treaties containing such limitations. He made no distinction based on the citizenship of the decedent but rather referred to the "cases accruing of *persons* dying in the United States, & leaving heirs in Germany" as being balanced by the cases of "naturalized Germans, resident in the U. States, who are entitled to inherit the property of their *relations* deceased in Germany." Had the treaties not covered the case of inheritance by Americans from German citizens leaving personal estates in Germany (and the converse case, now before this Court), the major objective of the treaties would in large measure have not been realized. Mr. Wheaton referred to the "vast" emigration going on from the German states to the United States, and, significantly, in illustrating the case in which a resident of the United States would profit, he mentioned the naturalized German who might inherit from his relations in Germany. If such an heir could inherit personalty only from "relations" in Germany who were

American citizens, a class certainly not numerous, we would have profited little under the proposed treaties.

Nor did the Department of State, in responding to Mr. Wheaton, make nice distinctions with regard to the heirs to be benefited. He was instructed to take as his "general guide" the treaties with Prussia, the Hanseatic Republics and Hanover, the pertinent clauses of which are substantially identical with Article IV of the instant treaty of 1923. The object of the treaties was stated to be "the removal of all obstructions * * * to the withdrawal from the one country, by the citizens or subjects of the other, of any property which may have been transferred to them by gift, contract, or will—or which they may have inherited *ab intestato*." 4 Miller, *Treaties, etc., supra*, 546, 548.

d. *Negotiations for the Treaty of 1848 with Austria*.—In Article XI of the Treaty of August 27, 1829, with Austria (8 Stat. 398, 401),³³ the form of the earlier treaties with Sweden and Norway was followed and realty and personalty were treated together, as "personal goods," in a single provision much like the instant paragraph with respect to personalty. In 1847 a revised extension of this treaty was negotiated, with the provisions of the Prussian, Wurttemberg and other German treaties as a model. Treaty of May 8, 1848, 9 Stat. 944; see 5 Miller, *Treaties, etc., supra*, 453, 456, 460.

³³ "The citizens or subjects of each party shall have power to dispose of their personal goods, within the jurisdiction of the other, by testament, donation, or otherwise; and their representatives, being citizens or subjects of the other party, shall succeed to their personal goods, whether by testament, or *ab intestato*, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their will, paying such dues, taxes or charges, only, as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases."

In the course of the negotiations, both parties commented on Article XI of the earlier treaty in a manner showing that they understood it to provide for inheritance without distinction based on the citizenship of the decedent. The Austrian Government suggested that a proposed exemption, in the new treaty, from the *droit d'aubaine* and the *droit de detraction* not affect the restrictions imposed by local Austrian authorities. Secretary of State Buchanan responded by letter dated July 19, 1847, pointing out that Article XI of the existing treaty already abolished these rights, without exception (5 Miller, *Treaties, etc.*, 457):

The 11th Article of the existing Treaty of the 27th August 1829, provides fully and satisfactorily, throughout all the States of both parties, for the abolition of the *droit d'aubaine* and all discriminating taxes, so far as personal property is concerned. Although this Article is silent in regard to real estate or landed property [³⁴], yet it is manifest that the same rule of justice ought to be applied to both kinds of property. Besides, the devise or descent of a real estate in Hungary to a citizen of the United States, will probably be an event of rare occurrence.

In compliance with this objection, the Austrian Charge d'Affaires abandoned his government's proposal and drafted an article to make explicit the reciprocal exemption. See 5 Miller, *Treaties, etc., supra*, 458. The draft provided (*ibid.*):

The stipulation, contained in the XIth Article of the Treaty of Commerce and

³⁴ Secretary Buchanan apparently believed that the phrase "personal goods" in Article XI did not comprehend real property. See p. 41, n. 26, *supra*.

Navigation of the 27th August 1829,—that the subjects or citizens of both contracting parties shall have power to take possession and dispose, at their will, of any inheritance mutually accruing, paying such dues, taxes or charges only, as the inhabitants of the country, wherein the said goods are, shall be subject to pay in like cases,—shall be applied to all cases of exportation of property from Austria to the United States of America and vice versa, in whatever way the exportation may take place, in consequence of the emigration of the owner, or of donation, or as marriage portion, or in any other way.

Apparently on Secretary Buchanan's motion, the reason for which does not appear, this Article was not included in the final treaty. See 5 Miller, *Treaties, etc., supra*, 459-460. The Secretary may have regarded it as unnecessary in view of the repetition of the former Article XI as Article I of the new treaty, and the insertion of a new Article II, which deals with realty in the language of the Prussian treaties and the instant treaty. 9 Stat 944. Plainly, however, this exchange of correspondence is a construction of Article XI of the 1829 Treaty as providing for the acquisition by the heir of any inheritance falling due to him without distinction based on the citizenship of the ancestor or donor. Thus both parties deliberately agreed upon a new treaty which they took to mean that the citizens of each should "have power to take possession and dispose, at their will, of any inheritance mutually accruing."

2. *The decision in Frederickson v. Louisiana*.—It is clear, then, that in 1860, at the time of the decision of the *Frederickson* case, the treaty provisions under discussion, including specifically the treaty with Wurttemberg, had consistently been understood as unqualifiedly

permitting the foreign heir to succeed to his inheritance or the proceeds thereof. This Court, not informed³⁵ of the history of the treaty provisions, adopted a contrary construction.

The testator in *Frederickson v. Louisiana* was a naturalized citizen of the United States, resident in Louisiana, and his legatees were citizens and residents of Wurttemberg. A Louisiana statute imposed a succession tax of 10 per cent on legatees not domiciled in Louisiana and not citizens of other states of the United States. Sec. 7, Act 315, 1855, Acts La., pp. 398, 399. The question was whether Article III of the Treaty of April 10, 1844, with Wurttemberg prevented application of the tax to the alien legatees. Article III provided (8 Stat. 588, 590):

The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the States of the other, by testament, donation, or otherwise, and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves, or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies, shall be liable to pay in like cases.

This Court, affirming the judgment of the Supreme Court of Louisiana, held that the Louisiana statute did not discriminate between citizens of Louisiana and aliens, but rather applied to legatees domiciled abroad without regard to their citizenship. The legatees, were, therefore, regarded as subject only to such duties as were

³⁵ The briefs, which are on file with the Court, contain no reference to the history of the provision.

exacted from citizens under the same circumstances. The Court, speaking through Mr. Justice Campbell, went on to state that the treaty was inapplicable to estates of citizens residing at home (23 How. 445, 447-448):

* * * But we concur with the Supreme Court of Louisiana in the opinion that the treaty does not regulate the testamentary dispositions of citizens or subjects of the contracting Powers, in reference to property within the country of their origin or citizenship. The cause of the treaty was, that the citizens and subjects of each of the contracting Powers were or might be subject to onerous taxes upon property possessed by them within the States of the other, by reason of their alienage, and its purpose was to enable such persons to dispose of their property, paying such duties only as the inhabitants of the country where the property lies pay under like conditions. The case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen or subject of the other, was not in the contemplation of the contracting powers, and is not embraced in this article of the treaty. This view of the treaty disposes of this cause upon the grounds on which it was determined in the Supreme Court of Louisiana.

It is submitted that the historical material discussed above fully demonstrates the error of this decision and therefore of the cases which followed it (p. 38, *supra*). The error is confirmed by the severe criticism of the case by the Wurttemberg Government and by the position thereafter taken by the Department of State with respect to other treaties, particularly the Treaty of 1899 with Great Britain.

a. *The Wurttemberg Protest.*—The Louisiana tax upheld in the *Fredrickson* case closely resembled the *droit de detraction*, one of the civil law taxes which these treaties had intended to abolish reciprocally, and it is small wonder that the Government of Wurttemberg filed a vigorous diplomatic protest against the decision. In a letter dated January 14, 1868, to Secretary of State Seward, the Consul-General of Wurttemberg, Leopold Bierwirth, severely criticized the decision as contrary to the plain meaning of the treaty and called attention to the contrary interpretation followed by the Wurttemberg Government (11 Foreign Consuls in the United States, MSS., Nat. Archives):

It would seem to be obvious that the heirs, legatees, and donees of citizens of the contracting parties are as fully under the provisions of this article as such citizens themselves, and that, to avoid doing violence to the terms of the compact, it must necessarily be held to provide that the heirs, legatees, and donees of citizens of each of the contracting parties, if themselves such citizens, shall succeed to the personal property of their ancestors, testators, and donors, paying such duties only as the inhabitants of the country where the property lies, shall be liable to pay in like cases. In other words, it would seem to have been unmistakably agreed that every subject of His Majesty is entitled to be placed on the same footing with an inhabitant of the United States; if he becomes the heir, legatee, or donee of a citizen of either of the contracting parties, in respect of personal property within the United States. And it would follow that a subject of His Majesty, answering to these conditions, is exempt from any tax from which any

inhabitant in the United States is exempt in like cases.

The authorities of Wurttemberg, judicial as well as executive and legislative, have invariably adhered to this construction sustained as it is by the context of the treaty, which in its second article [relating to realty] declares that * * *

* * * * *

Under this reading of the treaty, the personal property of Wurttembergers descending to persons belonging to the United States, has always been exempt from the payment of duties of detraction, whether situate in the one country or in the other. * * * It (the treaty) was interpreted as having been made rather for the benefit of the living than for that of the dead; rather for the advantage of the heirs, legatees, and donees, than for that of the decedents and donors; and if the former were intended to be relieved from the payment of duties of detraction, it could make no difference to them, whether the foreign country whence their inheritance came, was or was not the native country of the intestate from whom they derived it.

The succeeding Secretary, Hamilton Fish, replied that his Government was bound by the decision of the Supreme Court and suggested, as had his predecessor, that a new treaty be concluded to express the views of the Wurttemberg Government.³⁶

³⁶ Letter, Fish to Bierwith, June 7, 1869, 3 Notes to Foreign Consuls in the U.S. 140, MSS., Nat. Archives; Instruction, Seward to Bancroft, Minister to Prussia, Aug. 18, 1868, 15 Instructions to Prussia, No. 75, p. 2, MSS., Nat. Archives. See Bancroft Davis, *Notes upon Treaties of the United States of America and other powers* (1873), 159.

A proposed new clause was drafted by the Wurttemberg Government and its substance was agreed to by Mr. Fish,³⁷ but the inclusion of Wurttemberg in the German Empire in 1871 apparently ended the matter.³⁸

b. *Constructions by the Department of State*—i. *The Swiss and Russian Treaties*.—After this Court's decision in the *Frederickson* case, the Department of State took the view we advance in this brief in connection with Article V of the Treaty of November 25, 1850, with

³⁷ Despatch, Bancroft to Fish, Nov. 29, 1869, 16 Despatches, Prussia, No. 52, MSS., Nat. Archives; Instructions, Fish to Bancroft, Dec. 21, 1869, Jan. 24, 1871, 15 Instructions to Prussia, No. 168, p. 99, No. 193, p. 121, MSS., Nat. Archives. The proposed clause provided (Despatch, Bancroft to Fish, *supra*):

"The citizens of each of the contracting parties, where an inheritance falls to them ab intestate or by testament or donation in the personal property of a citizen of the other contracting party, shall succeed to the said personal property in all cases without regard to the country in which such testamentary disposition or donation may have been made and in whichever of the two countries the personal property so falling to them by intestacy or by will or donation may lie, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in like cases."

³⁸ It may also be noted that in 1868 the Louisiana court held that the treaty of 1845 with Bavaria (9 Stat. 826, 827), identical with the Wurttemberg treaty, exempted Bavarian heirs from the tax applied in the *Frederickson* case. *Succession of Crusius*, 19 La. Ann. 369. The opinion neither cites the *Frederickson* case nor does it reveal the citizenship of the decedent. Secretary of State Fish, however, pointed out to the Wurttemberg Government that this decision might mean that the Louisiana authorities would no longer construe the treaty as they had in *Frederickson's* case. Letter, Fish to Bierwith, June 7, 1869, 3 Notes to Foreign Consuls in the U.S. 140, MSS., Nat. Archives.

Switzerland (11 Stat. 587, 590).³⁹ That Article is substantially identical with the personalty clauses of both the Wurttemberg Treaty and the instant treaty of 1923. In 1868, a dispute arose concerning the inheritance by a United States citizen of the personal property of his Swiss maternal grandfather, located in the canton of Aargau. The cantonal authorities had refused to allow the American's claim on the ground that he was not a legitimate heir since his mother, a Swiss citizen, had not married in accordance with Swiss laws. In submitting the dispute to the High Federal Council of Switzerland, the American Minister at Berne argued that the question of the legitimacy of the claimant should be determined by the law of the United States and that, as an American citizen, the claimant "is justly entitled under the treaty to succeed to the property in question, and to take possession thereof by the attorney duly appointed for that purpose." *Diplomatic Correspondence of the United States, 1868*, Part II, 194, 196. The Council held that United States law governed the question of legitimacy but also observed that by virtue of the treaty of 1850 "an American citizen has the right, in case of successions, to be treated as a Swiss." While the major issue was the legitimacy of the American claimant, our minister and the Swiss authorities agreed that, assuming the claimant's legitimacy, the treaty put American citizen heirs on the same footing with Swiss heirs, and that they could therefore inherit from Swiss citizens. *Ibid.*, 197.

³⁹ "The citizens of each one of the contracting parties shall have power to dispose of their personal property within the jurisdiction of the other, by sale, testament, donation or in any other manner; and their heirs, whether by testament or *ab intestato*, or their successor, being citizens of the other party, shall succeed to the said property or inherit it * * *."

When in the next decade the same question arose, this Government again interpreted the treaty provision in this manner.⁴⁰ In 1880 it appeared that local Swiss authorities had detained personal property left by a Swiss to a naturalized American citizen of Swiss origin on the ground that since the claimant had not obtained the consent of the canton to his naturalization, his status as an American citizen would not be recognized. In instructing our minister at Berne to press the claim of the American heir, Secretary Evarts said (*Foreign Relations of the United States*, 1880, 952, 953):

Again, the fifth article [of the 1850 treaty] stipulate in substance that the heirs of a Swiss decedent, being citizens of the United States, whether native or naturalized, shall inherit and dispose of the property of such decedent at their pleasure.

And in 1877 the Secretary took the same position, under the similar treaty with Russia (8 Stat. 444, 448), with respect to the rights of Russian heirs in the United States. In an instruction to our Minister to Russia, he stated that under Article X of our treaty of December 18, 1832, with that country, "Russian subjects may inherit the personal estate of decedents in the United States and may take possession thereof, by themselves or by others." 4 Moore, *Digest of International Law* (1906), 6.

ii. *The British Treaty of 1899*.—The Louisiana tax statute applied in the *Frederickson*

⁴⁰ These constructions of the Swiss treaty were judicially confirmed in 1883 in *Jost v. Jost*, 1 Mackey (12 D.C.) 487, in which the Supreme Court of the District of Columbia held that under Article V of the 1850 treaty, Swiss heirs could inherit the personal estate of an American citizen decedent. The other state cases reaching the same result were decided in the present century. See *supra*, p. 39, n. 23.

case was repealed in 1877⁴¹ and, as has been shown, for the remainder of the century all the rulings were in support of the right under these treaties of an alien heir to inherit personal property from a citizen decedent. In 1894, however, the Louisiana statute was reenacted⁴² and during its four-year life⁴³ it precipitated the negotiations for what became the Treaty of March 2, 1899, with Great Britain on the subject of reciprocal inheritance rights. 31 Stat. 1939. The negotiations for this treaty show that although the language used was that of the Wurttemberg and Prussian treaties, the treaty was deliberately intended to override the Louisiana statute. The construction placed by the parties on the personalty clause is, therefore, additional evidence that the clause should not be taken to exclude the case of the alien inheriting personal property in this country from an American citizen decedent.

On September 24, 1895, Sir Julian Pauncefote, the British Ambassador in Washington, wrote to Secretary of State Olney as follows (125 Notes from Great Britain, MSS., Nat. Archives):

A recent enactment of the State Legislature of Louisiana imposing a 10 p/c duty on property inherited by foreigners resident abroad, has drawn the attention of Her Majesty's Government to the present position of British or American subjects, as the case may be, succeeding to property situated in the United States or Great Britain, respectively. There are no existing Treaty arrangements between

⁴¹ Act 86, 1877 La. Acts 125.

⁴² Act 130, 1894 La. Acts 165.

⁴³ The statute was declared unconstitutional in 1898 as in violation of the provision in the Louisiana Constitution requiring that revenue bills originate in the lower House. *Succession of Sala*, 50 La. Ann. 1009. It was not thereafter reenacted.

the two countries for protecting this class of persons from differential legislation directed against them.

* * * *

I am accordingly to ascertain whether the United States Government would be willing to sign a short convention, declaring:

(1) that no greater charges shall be imposed in the way of succession, probate or administration duties on real or personal property in the United States inherited by British subjects, whether domiciled within the union or not, than are imposed on property inherited by American citizens * * * with provisions securing reciprocal advantage in Great Britain * * * to citizens of the United States.

Although such records of the negotiations as have been preserved disclose no further reference to the Louisiana statute, it is clear that the provisions of the treaty relating to personalty were based on a draft prepared by this Government in response to Sir Julian's letter." Both

"On January 18, 1896, Sir Julian wrote to Secretary Olney referring to the hardships imposed upon British subjects by the laws in force in the United States prohibiting the ownership of real property by aliens. He suggested the conclusion of a treaty granting most-favored-nation privileges with respect to "the tenure, disposition and transmission of real property." 126 Notes from Great Britain, MSS., Nat. Archives. On May 20, 1896, he wrote a third letter, referring to his two earlier letters and requesting the decision of the Government of the United States in regard to the proposals made in the letters. *Ibid.* The first draft of the convention was submitted to the British Ambassador by Secretary of State John Hay on December 9, 1898. 24 Notes to Great Britain 541, MSS., Nat. Archives. Various changes were recommended by the British Foreign Office. Letter, Paunceforte to Hay, 130 Notes from Great Britain, Feb. 16, 1899, MSS., Nat. Archives. These were incorporated. The draft of Article II appeared substantially in what became its final form, the only change being the substitution of the word "territories" for the proposed word "States."

the draft and the final treaty relate solely to reciprocal inheritance rights and the representation of decedents by consuls of their nationality. Article I provides for the inheritance of real property, in the language of the Prussian and Wurttemberg treaties. Article II, dealing with personal property, also follows the earlier treaties (31 Stat. 1939):

The citizens or subjects of each of the Contracting Parties shall have full power to dispose of their personal property within the territories of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other Contracting Party, whether resident or non-resident, shall succeed to their said personal property, and may take possession thereof either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the citizens or subjects of the country where the property lies shall be liable to pay in like cases.

There is no evidence that the State Department representatives who drafted Article II, or the British representatives who agreed to it, were mindful of the decision in *Frederickson v. Louisiana*. Their failure to vary the treaty language explicitly to avert the ruling of that case suggests that they were not. Their adoption of the language of Article II without substantial change from the Wurttemberg form,⁴⁵

⁴⁵ The only language in Article II not found in the earlier treaties is the description of the heirs as "whether resident or non-resident." This new phrase merely emphasized the application of the treaty to British citizens wherever resident and could not of itself have been meant to overrule the *Frederickson* decision. If, however, the presence of this phrase is believed to make the *Frederickson* decision inapplicable, that conclusion applies as well to the instant case, since Article IV of the instant treaty with Germany likewise contains such language.

therefore, demonstrates that they held a view with respect to the treaty language opposite to that expressed in the *Frederickson* opinion.

The Louisiana statute which suggested the need for a treaty was understood, according to the British Ambassador's letter, as referring to inheritance by "foreigners resident abroad." That statute had directed his concern to the position of "British or American subjects, as the case may be, succeeding to property situate in the United States or Great Britain, respectively." No existing treaty between the countries, he pointed out, protected "this class of persons from differential legislation directed against them." And in his specific proposal for a clause respecting taxes on succession (broadened in the treaty to apply as well to the privilege of succession), the Ambassador referred to real or personal property in the United States "inherited by British subjects, whether domiciled with the union or not." Plainly, the British Ambassador was making no distinction among the class of British aliens who might succeed to property in the United States. He was seeking a treaty under which property in this country would descend to British citizens without regard to such factors as the citizenship of the decedent. And this Government, having presented a draft treaty to accomplish this purpose, should be held to have acquiesced in the British understanding: *Cf. Hauenstein v. Lynham*, 100 U.S. 483, 486-487.

Article IV of the Treaty of 1923 with Germany should be similarly construed.

In the Supreme Court of the United States

OCTOBER TERM 1967

No. 21

**In the Matter of the Estate of
PAULINE SCHRADER, Deceased**

**OSWALD ZSCHERNIG, MINNA PABEL, OLGA HERTA
WINCKLER, ALFRED KOESTER, JOHANNA BLASCHKE
and HANS FUESSEL,**

Appellants,

v.

**WILLIAM J. MILLER, Administrator of the Estate of
Pauline Schrader, Deceased, MARK O. HATFIELD,
TOM McCALL and ROBERT W. STRAUB, respectively
the Governor, Secretary of State and State Treasurer
of Oregon, constituting the STATE LAND BOARD OF
OREGON, and all persons unnamed or unknown having
or claiming any interest in the Estate of
Pauline Schrader, Deceased,**

Appellees.

Appeal from the Supreme Court of the State of Oregon

BRIEF OF APPELLANTS

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In the Supreme Court of the United States

OCTOBER TERM 1967

No. 21

In the Matter of the Estate of
PAULINE SCHRADER, Deceased

OSWALD ZSCHERNIG, MINNA PABEL, OLGA HERTA
WINCKLER, ALFRED KOESTER, JOHANNA BLASCHKE
and HANS FUESSEL,

Appellants,

v.

WILLIAM J. MILLER, Administrator of the Estate of
Pauline Schrader, Deceased, MARK O. HATFIELD,
TOM McCALL and ROBERT W. STRAUB, respectively
the Governor, Secretary of State and State Treasurer
of Oregon, constituting the STATE LAND BOARD OF
OREGON, and all persons unnamed or unknown having
or claiming any interest in the Estate of
Pauline Schrader, Deceased,

Appellees.

Appeal from the Supreme Court of the State of Oregon

BRIEF OF APPELLANTS

OPINIONS BELOW

The opinion of the Circuit (probate) Court of
Multnomah County, Oregon, was delivered orally, was
not reported officially or unofficially, and appears
herein at R. 9-11.

The opinion of the Supreme Court of Oregon is reported at 243 Or. 567, 412 P.2d 781 (R. 14). The further opinion on rehearing is reported at 243 Or. 592, 415 P.2d 15 (R. 35).

JURISDICTION

The Order Noting Probable Jurisdiction was entered by this Court on May 8, 1967. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

STATUTE INVOLVED

Directly involved in this appeal is the constitutional validity of Section 111.070, Oregon Revised Statutes, Volume I, page 856, which was enacted as Chapter 519, Oregon Laws 1951 (p. 900) and is commonly referred to as Oregon's reciprocal inheritance rights statute. This by its terms repealed and replaced Oregon's previous, original reciprocal inheritance rights statute, Section 61-107, Oregon Compiled Laws Annotated, which had been enacted as Chapter 399, Oregon Laws 1937 (p. 607). Inasmuch as the earlier reciprocity cases, material to this appeal, were under the original statute, it is deemed meet to set forth both statutes here for convenient reference and comparison.

Section 111.070, ORS:

"(1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamen-

tary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:

“(a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such an alien is an inhabitant or citizen;

“(b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and

“(c) Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.

“(2) The burden is upon such nonresident alien to establish the fact of existence of the reciprocal rights set forth in subsection (1) of this section.

“(3) If such reciprocal rights are not found to exist and if no heir, devisee or legatee other than such alien is found eligible to take such property, the property shall be disposed of as escheated property.”

Section 61-107, O.C.L.A.: [repealed in 1951 by ORS 111.070]

“The right of aliens not residing within the

United States or its territories, to take personal property or the proceeds thereof in this state by descent or inheritance, is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property or the proceeds thereof in like manner within the countries of which said aliens are inhabitants or citizens, and upon the right of citizens of the United States to receive, by payment to them within the United States, or its territories, moneys originating from estates of persons dying within such foreign countries. In the event no heirs other than said aliens are found eligible to take such property, said property shall escheat to the state of Oregon, as provided by law in those cases where a person shall die intestate without heirs."

The provisions of the Constitution of the United States involved in this case are:

In Article I, Section 8, entitled "Powers of Congress," the clauses:

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

"To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or officer thereof."

In Article I, Section 10, entitled "Limitations upon powers of states," the clauses:

"No State shall enter into any Treaty, Alliance or Confederation; * * *

"No State shall, without the Consent, of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; * * *

"No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State, or with a foreign Power * * *"

In the Fourteenth Amendment, Section 1, entitled "Citizenship; privileges and immunities; due process; equal protection," the clauses:

"nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[as published in Vol 5, Oregon Revised Statutes, at pp. 1140, 1141, 1145-6].

QUESTIONS PRESENTED

The fundamental question presented in this case may be stated as follows:

1. May the State of Oregon, may any individual state of the Union, enact statutes restricting or taking away inheritance rights in estates within its borders from *some, but not all* nonresident aliens, the application of such statutes being dependent upon whether the officials and/or the courts of such state deem and find that the country of which the alien heir or beneficiary is a citizen or resident meets the terms and conditions laid down by the state for

granting, restricting or denying rights of inheritance to nonresident aliens?

This fundamental question may be broken down into the following subsidiary questions:

2. Where the interpretation and application of such a statute result in granting their rights of inheritance to nonresident alien heirs or beneficiaries residing in some foreign countries, and in taking away and escheating to the state the rights of inheritance of nonresident heirs or beneficiaries residing in other foreign countries, depending on whether the state's terms and conditions as laid down in the statute are deemed to have been met by the foreign country in question, does such a statute invade the exclusive power of the Federal Government to regulate the foreign relations of the United States?

3. Specifically, should Section 111.070, Oregon Revised Statutes, [Oregon's so-called reciprocal inheritance rights statute] as interpreted and applied by the State of Oregon, be declared invalid and given no effect because:

a.) it is repugnant to Article I, § 10 of the Constitution of the United States, in that its application results in an unlawful invasion by the State of Oregon of the exclusive power of the Federal Government to regulate the foreign relations of the United States?

b). it is repugnant to Article I, § 8 of the Constitution of the United States in that its application results in an unlawful invasion by the State of Ore-

gon of the exclusive power of the Federal Government to regulate the foreign commerce of the United States?

c.) it is repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States in that it deprives persons residing in the Soviet-occupied zone of Germany of their property without due process of law?

STATEMENT OF THE CASE

This litigation is a controversy between the State of Oregon and the next of kin and heirs at law of Pauline Schrader, deceased, to determine whether her heirs are entitled to distribution of her modest estate or if it should be escheated to the State of Oregon. However, several basic principles of domestic and international law as well as important constitutional questions are involved, and the determination of this case will have very far-reaching impact not only in the State of Oregon but throughout the land.

The facts are simple and not in dispute.

The Facts

Pauline Schrader, a resident of Portland, Oregon, died there, intestate, on September 30, 1962. She was a widow, had and left no issue, she was a naturalized American citizen, and left an estate appraised at \$17,764.72, consisting of real property, that is her modest home, appraised at \$4500, the rest in savings

and other personalty. Her next of kin and heirs are the appellants, a brother, sister, four nieces and nephews, all residing at or near decedent's native town not far from Leipzig, situated in the Russian-occupied zone of Germany. Over the years since 1945 this region has also been called and variously referred to as East Germany, the German Democratic Republic (GDR), the Deutsche Demokratische Republik (DDR), the Russian Zone, the Eastern Zone or the Soviet Zone of Germany. In this proceeding appellants have used "Soviet Zone" because they deem that most accurately descriptive of that portion of Germany occupied and administered pursuant to agreement of the Allied Powers by the armed forces of the U.S.S.R. since the end of the World War II hostilities.

The State of Oregon, acting through the State Land Board of Oregon [composed of the Governor, Secretary of State and State Treasurer], represented by the state's Attorney General, filed a Petition for Finding and Order of Escheat (R. 2) in the probate court, alleging that the decedent's heirs—then not yet definitely identified—resided in "East Germany," that they were not eligible to take without proof of the existence of the rights required under the provisions of ORS 111.070, that such rights do not exist "with respect to East Germany," that there are no heirs eligible to take and praying that the whole estate, that is the "clear proceeds" thereof, be escheated to the State of Oregon.

The heirs, appellants herein, countered with a Pe-

tition to Determine Heirship (R. 3) setting forth their identities and relationships as the decedent's heirs, their residence at and since Pauline Schrader's death in the "so-called Eastern or Soviet Occupied Zone of Germany," and claiming that they were entitled to take under the provisions of Article IX, paragraph 3 of the Treaty of Friendship, Commerce and Navigation between the governments of the United States of America and of the Federal Republic of Germany signed at Washington on October 29, 1954, effective July 14, 1956 [7 UST 1839; TIAS 3593; 278 UNTS 3] reading as follows:

"3. Nationals and companies of either Party shall be accorded national treatment, within the territories of the other Party, with respect to acquiring property of all kinds by testate or intestate succession or under judicial sale to satisfy valid claims. Should they because of their alienage be ineligible to continue to own any such property, they shall be allowed a period of at least five years in which to dispose of it."

The heirs alleged further that by reason of said treaty provision ORS 111.070 had no application to their right to inherit and to receive distribution of the estate.

In its Answer to said Petition (R. 7) the State Land Board of Oregon admitted existence of the 1954 treaty between the United States and Germany but prayed that the court find that said treaty "has no application to residents of Eastern Germany" and again demanded the escheating of the whole estate to the State of Oregon.

In their Reply (R. 9) the heirs alleged that ORS 111.070 "is in violation of the existing policy of the federal government of the United States of America and constitutes an unlawful and unauthorized attempt by the State of Oregon to invade the exclusive power of the Federal Government to regulate the foreign relations of the United States of America; that therefore said statute is invalid and should be given no effect by this Court."

There were extended court hearings at the conclusion of which the probate judge rendered an oral opinion (R. 9) holding that because of the territorial limits set forth therein the 1954 treaty did not apply to "the people in East Germany," the court's rationale being that

"There are and have been since 1949 two separate and distinct governments controlling what used to be a unified Germany. There is, as we know, the government of the Federal Republic of Germany with which the 1954 Treaty was made, and there is the government of the German Democratic Republic that is the satellite of Communist Russia." (R. 10)

The court further held that the 1923 treaty between the United States and Germany (TS 725, 44 Stat. pt. 3, pp. 2132, 2150) was not applicable because "It was abrogated long before the times in which we are interested." (R. 10)

On the constitutional issue of the reciprocity statute's questioned validity raised by the heirs' reply the court said that this "is without merit in view of the

decision of the United States Supreme Court in the case of *Clark v. Allen*, 331 U.S. 503, 91 L. Ed. 1633," adding that

"If the rules of law announced in that case should be changed because of changed conditions in the world or for political reasons, the Congress or the Supreme Court of the United States should revise the laws, certainly not this Probate Court."
(R. 11)

Accordingly the court directed and there was entered an order escheating the entire estate to the State of Oregon (R. 11).

On appeal to the Supreme Court of Oregon, that court affirmed the ruling against applicability of the 1954 treaty to "residents of East Germany" (R. 19, 33) but held that under *Clark v. Allen* the 1923 treaty was applicable to them in respect to real property (but not personal property) and modified the probate court's order of escheat to the extent that the heirs were entitled to inherit the real property (R. 30, 31, 34).

To the constitutional issue the Supreme Court devoted less than a page of its opinion, rejecting appellants' contentions and pleadings for reexamination of the question with the statement that

"This argument was also put to bed by *Clark v. Allen, supra.*" (R. 30)

The court did not comment on Mr. Justice Douglas' statement in his dissent in *Ioannou v. New York*, in which Mr. Justice Black concurred, [371 U.S. at 33] that

"The question seems substantial and does not seem to be foreclosed by *Clark v. Allen*, 331 U.S. 503."

In a brief further opinion (R. 35) appellants' petition for rehearing was denied.

SUMMARY OF ARGUMENT

While it is recognized that laws of inheritance are traditionally and properly within the competence of the individual States, a state statute which in its interpretation and application by state courts impairs the exercise of the Nation's foreign policy or invades the exclusive federal power to regulate the foreign relations of the United States must be held invalid and given no effect. Such a statute is repugnant to several provisions of the Constitution of the United States.

As will be demonstrated below, § 111.070, Oregon Revised Statutes, Oregon's so-called reciprocal inheritance rights law, as interpreted and applied by the Oregon Supreme Court, and of course by the probate courts of that state, is such a statute. Its legislative purpose and effect is to require foreign nations to conform to the terms and conditions laid down in the statute to make their citizens and nationals eligible to inherit from Oregon estates. Failure to so conform results in depriving the nonresident alien heir of his inheritance, in the confiscation thereof by escheat to the state if no other heir eligible to take exists outside the proscribed foreign country.

Some ten other states, including most notably California and Montana, have similar reciprocal inheritance rights statutes pursuant to which many inheritances, some of very substantial value, have been taken away from the foreign heir or testamentary legatee and diverted to other, so-called "eligible" heirs, or taken by the states through escheat. In every post-war case the deprived heir or legatee has been in an "Iron Curtain" country, resulting in the development of the "Iron Curtain Rule." In numerous decisions the state courts have indulged in harsh, intemperate, derisive, defamatory, even contemptuous language towards the governments and officials of the foreign countries involved. All this has inescapably affected the foreign relations of the United States.

While any individual state may enact statutes restricting or taking away inheritance rights in estates within its borders from *all* nonresident aliens, it may not lay down terms and conditions under which *some* nonresident aliens may and some may not inherit, depending on whether their country has, in the state court's judgment, met the prescribed terms and conditions.

The regulation of the inheritance rights in the United States of nonresident aliens, because of its impact on the foreign relations and the foreign commerce of the United States, must, if found in the public interest, be exercised only by the Federal Government. As in the case of the "Act of State"

doctrine, most recently declared by this Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), such regulation of inheritance rights of non-resident aliens lies exclusively in the federal domain and must be exercised, if at all, by uniform federal law.

This Court's decision in *Clark v. Allen*, 331 U.S. 503, assuming *arguendo* that it was correct in 1947, is no longer valid in light of the changed conditions during the past twenty years.

ORS 111.070 is clearly repugnant to Article I, Section 8, Article I, Section 10, and Section 1 of the Fourteenth Amendment to the Constitution of the United States, and should be declared invalid and of no effect.

ARGUMENT

Point I

If inheritance rights of nonresident aliens to decedents' estates in the United States are to be restricted, conditioned or otherwise regulated, it must be done by the federal government and by federal law uniform throughout the nation. Individual state action in this field has resulted in chaos and gross injustices as well as transgression into the forbidden field of foreign relations.

It would appear in order to first set forth a brief resume of the legislative history of the statute here involved, that is ORS 111.070, then to show how this statute and its predecessor, § 61-107 Oregon Compiled Laws Annotated, have been interpreted and applied by the Oregon courts. There will follow a similar

review of the legislation and court decisions in the field of reciprocal inheritance rights in some of the other states, primarily California because of the close relationship of the Oregon to the California statutes and because by far the greatest volume of litigation on the subject has occurred in that state.

a. History of the Oregon statute.

Oregon has the doubtful distinction of having been the first American state to enact legislation to curb the traditionally equal rights of nonresident aliens to inherit from decedents' estates in the United States. The 1937 legislature enacted Chapter 399, Oregon Laws 1937 (p. 607) which became § 61-107 O.C.L.A. (set forth at p. 3 supra) and remained in effect until repealed and replaced by ORS 111.070 in 1951. In *Clostermann v. Schmidt*, 215 Or. 55, 332 P.2d 1036 (1958), in which the death occurred on April 24, 1945, and the Attorney General of the United States, in his capacity as Alien Property Custodian, tried—unsuccessfully—to vest the inheritance of the German legatee, the Oregon Supreme Court described the purpose of the statute as follows (p. 68):

“The purpose of § 61-107, O.C.L.A., is clear beyond doubt. It was enacted to assure reciprocal rights of inheritance to American citizens and alien residents or citizens. It was, in a sense, an inducement to foreign nations to so frame the inheritance laws of their respective countries in a manner which would insure to Oregonians the same opportunities to inherit and take personal property abroad that they enjoy in the state of

Oregon. In re Estate of Krachler, supra (199 Or. at page 457)."

As pointed out in the most scholarly and exhaustive opinion of Mr. Justice Brand in *Krachler (State Land Board of Oregon v. Brownell, Attorney General of the United States, and Hagmaier)* 199 Or. 448, 263 P.2d 769 (1953) the Oregon statute, unlike California's Probate Code § 259 enacted in 1941, provided that to meet the reciprocity requirement the foreign country must grant to United States citizens the same rights of inheritance that Oregon law grants to the citizens of that country. The California statute's requirement for reciprocity was (and is today) that the foreign country must grant to American citizens the same rights as to its own citizens, that is there must be no discrimination against American citizens. Also, the Oregon statute by its terms covered only personal, not real property. And there was the so-called "right to receive payment" requirement, that is American heirs had to have the right to "receive, by payment to them within the United States, or its territories, moneys originating from estates of persons dying within such foreign countries." This latter provision was to play a highly important role in the judicial interpretation and application of the statute which, as will presently be seen, have a direct bearing on the foreign relations of the United States.

§ 61-107 O.C.L.A. remained in effect unamended until repealed by Chapter 519, Oregon Laws 1951 (p. 900), set forth verbatim in the Jurisdictional State-

ment at pp. 6 and 7, which became ORS 111.070, set forth at p. 2 *infra*. There were several significant changes and innovations. Both real and personal property were now covered. The reciprocity requirement in respect to inheritance rights was changed to conform verbatim to California's Probate Code § 259, that is that the foreign country must accord to Americans the same rights of inheritance as to its own citizens, but the "right to receive payment" requirement was retained although it had been taken out of California's PC 259 by a 1945 amendment.

Most importantly, however, there was added to the Oregon statute the so-called "benefit, use or control" requirement which is the essence of the much milder, non-confiscatory statutes adopted by a number of eastern states, such as § 269a of the New York Surrogate's Act enacted in 1939 which was involved in *Ioannou v. New York*, 371 U.S. 30 (1962) and on which there will be comment later. And on top of that something not even in the eastern—or any other—statutes on the subject, was added, namely that the foreign heir must receive "the benefit, use or control" of his inheritance from Oregon "without confiscation, in whole or in part, by the governments of such foreign countries." This of course made it necessary for the Oregon courts to inquire into, to consider and to "sit in judgment" on the laws, regulations, administrative policies and other "acts of state" of the foreign governments concerned in respect to foreign valuta received by their citizens from abroad, leading to

a direct involvement in the foreign relations—and the foreign commerce—of the United States.

ORS 111.070 has remained in effect unamended from 1951 to this day.

b. Review of the pertinent Oregon Supreme Court decisions.

It would greatly extend this brief and it is not deemed necessary to here mention and discuss every decision of the Oregon Supreme Court involving § 61-107 O.C.L.A. and ORS 111.070. The discussion will therefore be confined, in their chronological order, to those cases material to the issues in this appeal.

1. *Braun's Estate*, 161 Or. 503, 90 P.2d 484 (1939).

This is mentioned only because it was the first case (date of death July 26, 1937) to reach the court in which the reciprocity statute was involved and the court pointed to the necessity of the alleged German heirs submitting proof that the requirements of the statute were met as of the date of decedent's death.

2. *Estate of Krachler*, 199 Or. 448, 263 P.2d 769 (1953).

The long hiatus between *Braun* in 1939 and *Krachler* in 1953 may be explained by the war years, 1941-1945 and perhaps the inclination of the parties and counsel to observe and await the eventual outcome of the reciprocity litigation in California where, because of the greater population and correspondingly

larger foreign colonies, a considerable volume of reciprocity litigation was under way. *Krachler* is primarily of interest here because of the painstaking analysis of the statute, of the "enormous" (p. 504)—and correspondingly enormously expensive—record of evidence required, pro and con, including the inevitable "battle of the experts," to present and try out a reciprocity case, and, most importantly, because it demonstrates the great extent to which the court found it necessary to examine and "sit in judgment" on the laws, ministerial decrees, foreign funds control regulations, court decrees, administrative determinations and other "acts of state" of the German government, the ideologies of the nazi regime, etc. The trial court's ruling for reciprocity and awarding the estate to the Attorney General of the United States under a vesting order was reversed, and the case remanded to the lower court with directions to determine whether the estate should go to the American claimant or to the State of Oregon as an escheat.

3. *Closterman, Exec. v. Schmidt*, 215 Or. 55, 332 P.2d 1036 (1958).

This case, previously mentioned to show the purpose of § 61-107 O.C.L.A., also involved reciprocity with war-time nazi Germany with the Attorney General of the United States, as Alien Property Custodian, opposed to the executor and the Attorney General of Oregon who would claim the estate as an escheat—no so-called "eligible" heir having as yet appeared—if the legatee in Germany were found not

entitled to take. The Custodian contended that the decision against reciprocity in *Krachler* was not applicable because the town in Germany where the legatee resided had been occupied and "liberated" by American troops some nine days before the testator's death on April 24, 1945; that this had immediately resulted in the invalidation of the laws, decrees, regulations, etc., imposed by the nazi regime on basis of which the court had ruled against reciprocity in *Krachler*; and that in the liberated areas of Germany the law was restored to what it was prior to the nazi domination. The court rejected this argument, pointing out that the "country" of Germany had to be considered as a whole, that the nazi government was on April 24, 1945, still the ruling government of the country and that no cognizance could be taken of a difference in law in the liberated portions.

[Parenthetically it may be pointed out that the Court took a different view in this Schrader case where the Court rejected the heirs' argument that the Soviet Zone of Germany was an integral part of the country of Germany and that therefore the law of the Federal Republic, including the 1954 treaty, applied to residents of the Soviet Zone.]

Schmidt illustrates again how deeply the state courts must, in reciprocity cases, inquire into and concern themselves with law of the foreign country, even a portion of the country, in which the alien heirs reside.

4. *State Land Board v. Rogers*, 219 Or. 233, 347 57 (1959).

This again was a controversy between the United States Attorney General [William P. Rogers] as successor to the Alien Property Custodian and the State of Oregon, involving the estates of three decedents of Bulgarian origin whose heirs were in Bulgaria and whose rights the Custodian had vested. The deaths occurred in 1940, 1944 and early 1945 respectively so the case was of course under the original reciprocity statute. Up to the time of the oral argument of the appeal the Oregon Attorney General had contended that there existed neither the reciprocal right of inheritance, that is the "right to take," nor the "right to receive," that is the right of American heirs to receive payment within the United States of their inheritance from Bulgarian estates. However, at the oral argument the State conceded the "right to take" [the reasons therefor are not indicated] which left only the question of the "right to receive." All earlier cases had turned on "the right to take," making it unnecessary for the court to concern itself with the "right to receive." (219 Or. at 239)

There was the usual wealth of documentary evidence and expert testimony. The court held that the date of death was also determinative of the second requirement, that is the right to receive (p. 241). The court then proceeded to consideration of the Bulgarian foreign exchange laws and regulations and the expert testimony in respect thereto. Pointing to the necessity of a license to send money out of Bulgaria to the United States, the court said: (p. 245)

"... the fact remains that the ultimate 'right to receive payment' under the Law and Regulations is not a certain one, but depends upon the discretionary will of those who are officials of the Bulgarian National Bank. What the Bulgarian National Bank may have done yesterday, 'as a matter of course,' in the exercise of its powers of discretion, may not be the rule or custom of tomorrow. The condition imposed by § 61-107, O.C.L.A., supra, demands legal certainty of payment, and not a payment dependent upon the whim of any person or institution of the foreign country where the right to take the inheritance originates."

The court affirmed the trial court's decrees escheating the three estates, except for certain real property in one of the estates which was of course not then within the reach of § 61-107 O.C.L.A.

In effect the court undertook to justify the taking by the State of the inheritances of these decedents' heirs in Bulgaria by holding that their rights were destroyed by their government's "act of state," that is the foreign exchange laws and regulations which their government presumably found necessary to impose in the management of its fiscal affairs. More about this in our discussion of *Sabbatino*.

5. *State Land Board v. Kolovrat, State Land Board v. Zekich*, consolidated for trial and appeal. 220 Or. 448, 349 P.2d 255 (1960). [Reversed sub nom. *Kolovrat v. Oregon*, 366 U.S. 187 (1961) on ground of U.S.-Yugoslav treaty]

In these cases the trial court ruled for reciprocity with Yugoslavia and held the decedents' heirs in Yugoslavia entitled to distribution both on the evidence in respect to the existence of reciprocity in fact and by virtue of an 1881 treaty with Serbia in force with Yugoslavia. The Oregon Supreme Court, on appeal by the State Land Board of Oregon, reversed on both grounds, addressing itself, however, as in *Rogers*, supra, only to the second requirement, that is (p. 454)

“ . . . whether there is a certain and enforceable right vested in American citizens to receive the proceeds of a Yugoslavian inheritance in this country.”

On the treaty issue, the court saw fit to adopt the very strained construction of the language of Article II of the Convention for Facilitating and Developing Relations of 1881 between the United States and Serbia (22 Stat. 963, Treaty Series 319) (set forth at 220 Or. 463) as urged by the Oregon Attorney General. The court discerned a similarity between that language and this Court's construction of the language of Article IV of the German treaty of 1923 (44 Stat. 2132) in *Clark v. Allen*, 331 U.S. 503, and on authority thereof ruled that the 1881 Serbian treaty did not provide for inheritance rights by Yugoslav heirs in estates left in the United States by American citizens. It must be said in candor that the California Supreme Court had similarly construed the 1881 Serbian treaty in *Arbulich's Estate*, 41 Cal. 2d 86, 257 P.2d 433 (1953), in which certiorari was denied by

this Court, 346 U.S. 897, and a petition for leave to file a petition for rehearing was also denied, 347 U.S. 908. It should further be said that although at the date of Arbulich's death on March 21, 1947, a 1945 amendment to the original 1941 statute had eliminated the "right to receive payment" requirement, and had even written in a presumption that reciprocity exists unless the contrary is shown (257 P.2d at 435), the court nevertheless held that "The 'right' to receive the benefits of the inheritance is a necessary and inherent corollary to the 'right' to take by inheritance. One is not separable from the other. The one includes the other. If the right to take exists * * * the right to receive exists. * * *" (p. 440). Furthermore there was in *Arbulich* a detailed analysis of the Yugoslav foreign exchange law and decrees pertaining thereto (pp. 438, 439) at the conclusion of which the court said: (p. 439)

"But a reading of the entire substance of the documents mentioned makes it apparent that the trial court was justified in reaching the conclusion that under Yugoslav law a citizen of the United States, at the time of decedent's death, had no definitely ascertainable and enforceable right to *receive* Yugoslav property by testament, and that the receipt of any such property would depend in each case upon the largely, if not entirely, uncontrolled discretion of the Minister of Finance. . . ."

The testimony of the Ambassador of Yugoslavia to the United States assuring the court that not only

under the 1881 treaty but regardless of whether or not the treaty was applicable United States citizens had and were accorded "their full, complete and unabridged rights of inheritance to inherit from their relatives or from their estate in Yugoslavia," was dismissed as serving "at most to create a conflict in evidence as to the ultimate fact and is not controlling on the issue of reciprocity" (p. 437).

The court reversed the District Court of Appeal (248 P.2d 179 which had reversed the trial court and ruled for reciprocity), held that the brother in Yugoslavia, named as sole beneficiary in the will was not eligible to inherit and awarded the entire estate to another brother in San Francisco whom the testator had specifically disinherited in his will. In the recent case of *Larkin's Estate*, 65 A.C. 49, 52 Cal. Rptr. 441 (1966) (which will be discussed below) holding for reciprocity with the Soviet Union, the California Supreme Court disavowed most of the reasoning and grounds on which—other than the treaty aspect—it had taken away the Yugoslav brother's and beneficiary's inheritance, but that does not console him or redress the great injustice that was done to him. However, it will be seen that the Oregon Supreme Court did have the authority of the California Supreme Court's decision in *Arbulich* to support its rulings in *Kolovrat/Zekich* on both the treaty and the Yugoslav foreign exchange control aspects of the case.

Not raised in *Arbulich* but very strongly urged in *Kolovrat* was the point that Yugoslavia was a sig-

natory to the Bretton Woods Agreement of 1944, a member of the International Monetary Fund, that the Yugoslav foreign funds control laws and regulations were imposed and formulated pursuant thereto, in effect pursuant to a treaty with or at the least an international agreement sponsored by the United States, but the Oregon Supreme Court disposed of that with the following: (220 Or. at 472)

"The Bretton Woods Agreement gives no support to the thesis of defendants and, to the contrary, is in a large sense on [sic] international recognition that some countries, rightly or wrongly, would impose strictures such as are exemplified by the foreign exchange laws of Yugoslavia and Bulgaria (see *State Land Board v. Rogers*, *supra*)."

In the *Kolovrat* opinion there is language which might be construed as disparaging and belittling the words and activities of the diplomatic, consular and other officials of a recognized foreign government. Space does not permit full quotation but the following excerpts from pages 460, 461 and 462 are noteworthy:

pp. 460-461:

"The record is replete with evidence of remittances from estates in Yugoslavia to persons in the United States and the testimony of Yugoslavian consular representatives and experts called by the defendants concerning the movement of such funds, all offered as proof that American citizens have in the past received their legacies by delivery in the United States. This phase of

the case is further amplified by self-serving declarations of the same tenor from Yugoslavian diplomatic representatives to the State Department and documents emanating from officials in that country . . ."

* * *

pp. 461-462:

"Even if it can be said these items of evidence do reveal a flow of exchange from Yugoslavia to American heirs as of December, 1953, they, at the most, only attest the indulgence of the Yugoslavian authorities as to the American heirs as of that time. * * * The fact that some American citizens were so favored does not preclude wonderment as to how many may have been denied 'the right to receive' or, indeed, whether those who did receive moneys by exchange, received all or only a part thereof * * *."

It may be pointed out that, as will be more thoroughly demonstrated later, the California courts, most recently the California Supreme Court in the *Larkin* case, supra, holding for reciprocity with the Soviet Union, viewed with strong approval the proof submitted of inheritance funds actually received from the USSR by American heirs (52 Cal. Rptr. at 451-452).

That reflections by state courts on the credibility and integrity of diplomatic, consular and other high officials of foreign governments must inevitably embarrass the executive branch and have an adverse effect on the relations of the United States with the offended country cannot be denied and needs no dem-

onstration. It has been shown that the courts of last resort of Oregon and California have widely divergent concepts of what sort of evidence is required to prove reciprocity. Potentially there can be fifty different such concepts if this field is left to individual state action rather than being placed in the federal domain where it clearly and constitutionally belongs.

6. *Mullart v. State Land Board*, 222 Or. 463, 353 P.2d 531 (1960).

[Estate of August Kasendorf, deceased.]

This is another war-time case in which the deceased died on November 21, 1943. He left a will naming as beneficiaries a brother and three sisters, the survivors of them or their descendants, all living in Estonia, one of the three Baltic republics annexed by the USSR. All disappeared without trace except one sister Anna. It was established that she died in Estonia "sometime subsequent to the forepart of December 1943". (222 Or. at 481). Her heir was a daughter Damara in Chicago who had fled from Estonia in February 1944, going first to Sweden and eventually reaching Chicago in 1949. To recover this estate Damara had of course to prove the two requirements of § 61-107, O.C.L.A., in respect to Estonia as of November 21, 1943, while the war was at its height, since she would inherit as the successor in interest of her mother, decedent's postdeceased sister. It is not clear if the Russians or the Germans were actually in control of Estonia at the date of Kasendorf's death but that may be immaterial inasmuch as the annexation

of Estonia by the USSR (and its conversion into a republic of the USSR) has never been recognized by the United States.

Evidence of reciprocity was given by the Acting Consul General of Estonia in New York. It was brought out that prior to the invasion of Estonia in 1940, that country had foreign exchange regulations which were in fact (and to a considerable extent are today) quite general and standard in most nations of the world. On the "right to receive payment" requirement the court said: (220 Or. at 479)

"Because of what we have to say concerning the force and effect of art. XXIV of the Treaty of 1925, we need not particularize our reasons for holding that the Estonian exchange regulations of 1940, like those of Bulgaria and Yugoslavia, stand as a bar to the right of an American heir of an Estonian estate to ultimately and with legal certainty receive payment of his legacy in the United States, as required by § 61-107, OCLA. In *re Christoff's Estate*, supra (347 P.2d at page 61); In *re Stoich's estate*, supra (349 P.2d at page 268)".

Continuing from p. 480:

"... But we find that an American's right to receive payment of an Estonian legacy in the United States is not dependent alone on the whims of Estonian officialdom under the exchange regulations of that country. Such an American heir could, if he had been disappointed in that direction, invoke the aid of a United States Consul, resident in Estonia, as provided

by Art. XXIV of the Treaty of 1925, and have that official demand receipt for and transmit to him through appropriate agencies of this government such heir's share of an Estonian estate.

"Art. XXIV, of the Treaty of Friendship, Commerce and Consular Rights, signed by the United States and Estonia on December 23, 1925 (44 Stat. 2379) reads:

'A consular official of either High Contracting Party may in behalf of his non-resident countrymen receipt for their distributive shares derived from estates in the process of probate or accruing under the provisions of so-called Workman's Compensation Laws or other like statutes provided he remit any funds so received through the appropriate agencies of his Government to the proper distributees, and provided further that he furnish to the authority or agency making distribution through him reasonable evidence of such remission.'

"The state concedes that this treaty has not been abrogated."

It is not stated what United States Consul was present in Estonia on November 21, 1943, to make such a demand or how he could have made such a demand for an American heir to an estate in Estonia, and then have furnished "to the authority or agency making distribution through him reasonable evidence of such remission." No one would begrudge Damara her eventual inheritance of her uncle August Kasendorf's estate. The point is that this ruling in favor of re-

ciprocity with Estonia is hardly reconcilable with previous rulings against reciprocity with Bulgaria and Yugoslavia or subsequent rulings against reciprocity with Czechoslovakia and the Soviet Zone of Germany.

7. *State Land Board v. Pekarek*, 234 Or. 74, 378 P.2d 734 (1963).

The facts in this case are particularly noteworthy. The decedent, Martin Pekarek, was a citizen, resident and domiciliary of Czechoslovakia. For some years before his death he had lived in Portland, Oregon, where he established a savings account with the First National Bank. He left this, also a will in favor of his children in Czechoslovakia, with the bank when, several years before his death, he returned home and rejoined his family in Czechoslovakia. He died there on December 21, 1953, whereafter the Portland bank filed the will left in its custody for probate and, pursuant to its designation therein, the bank was appointed executor by the probate court of Multnomah County, Oregon. The estate consisted solely of the savings account of approximately \$7,600.

The Oregon Attorney General filed a Petition for Finding and Order of Escheat denying that the Czechoslovak beneficiaries were eligible to inherit under ORS 111.070 and praying for the escheating of the estate to the State of Oregon. The beneficiaries alleged that the three requirements of the statute were in fact satisfied by Czechoslovakia, furthermore they vigorously contended that under the axiom *lex domicilii decedentis* and the doctrine of *mobilia sequuntur*

personam the money in the bank account had its situs in Czechoslovakia, not Oregon, and that therefore ORS 111.070, being a substantive law of inheritance of the State of Oregon, did not apply thereto. The probate court and, on appeal, the Oregon Supreme Court rejected this contention, holding that: (234 Or. at 77)

"We are of the opinion that it was the legislative purpose to subject bank accounts to the operation of ORS 111.070."

On the reciprocity issue the heirs produced a certificate by the Ambassador of Czechoslovakia in Washington giving detailed information and assurances that the three requirements of ORS 111.070 were fully met by Czechoslovakia at the time of decedent's death. The Embassy's First Secretary, who was also the Chief of its Consular Division, together with a practicing lawyer from Prague, testified in detail and there was the usual mass of documentary evidence customarily offered in a reciprocity presentation (p. 80). The State of Oregon produced an expert witness who had left Czechoslovakia in 1948 and seemingly did not deeply impress the court but, as the court said (p. 81):

"The state is handicapped in this class of cases because the iron curtain limits the evidence available to it."

The Supreme Court concerned itself only with subparagraph (c) of subsection (1) of ORS 111.070, that is the third "benefit, use or control" requirement, and then only with the clause thereof that the foreign

heirs must receive the money or property "without confiscation, in whole or in part, by the governments of such foreign countries." After quoting Treasury Department Circular No. 655, Supp. 7 issued under 31 CFR § 211.3 (a) which as of Pekarek's death included Czechoslovakia, as follows: (p. 82)

"The Secretary of the Treasury hereby determines that postal, transportation, or banking facilities in general or local conditions in Albania, Bulgaria, Communist-controlled China, Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, the Union of Soviet Socialist Republics, the Russian Zone of Occupation of Germany, and the Russian Sector of Occupation of Berlin, Germany, are such that there is not a reasonable assurance that a payee in those areas will actually receive checks or warrants drawn against funds of the United States, or agencies or instrumentalities thereof, and be able to negotiate the same for full value."

the court said:

"This official determination was operative at the date of decedent's death. We regard this official declaration as evidence that foreign beneficiaries would not receive their interests free from control amounting to, at least, a partial confiscation."

Directly on this ground the court affirmed the probate court's decree escheating the estate to the State of Oregon.

Of particular cogency is the following from the penultimate paragraph of the opinion: (p. 83)

"... Assuming, without deciding, that all of the evidence offered by the legatees was admissible, it can be given relatively little weight. The statements of Czechoslovakian officials must be judged in the light of the interest which they had in the acquisition of funds for their government. Moreover, in judging the credibility of these witnesses we are entitled to take into consideration the fact that declarations of government officials in communist-controlled countries as to the state of affairs existing within their borders do not always comport with the actual facts."

It may be taken as a certainty that this escheating, in effect confiscation, by the State of Oregon of a bank account left in Oregon by a citizen, resident and domiciliary of Czechoslovakia was in itself deeply resented in the chancellories of Prague and other eastern European capitals. Add to that the aspersions on the officials of those countries and no one could argue with any conviction that a case such as this does not seriously affect the foreign relations of the United States.

8. *State Land Board v. Schwabe, admr.*, 240 Or. 82, 400 P.2d 10 (1965).

This case involved reciprocity with Poland as of decedent's death in 1954. Presumably encouraged by the ruling in *Pekarek*, supra, against Czechoslovakia on the basis of its inclusion in Treasury Department Circular 655, the Oregon Attorney General relied on Poland's inclusion in the Circular in 1954. It was

shown that upon conclusion of a debts settlement and other agreements with the United States Poland was removed from the list as of June 7, 1957. Also there was a certificate by the Polish Ambassador similar to that by the Czechoslovak Ambassador offered in *Pekarek*. The following from the court's opinion is directly pertinent: (240 Or. at 83-84)

" . . . This ban on the sending of Federal checks to Poland was lifted on June 7, 1957. In *State Land Board v. Pekarek*, supra, 234 Or. at page 82, 378 P.2d 734, we gave this circular prevailing weight over claims of reciprocity made by a certificate of the Ambassador from Czechoslovakia similar to that in evidence here. However, in the instant case there was other evidence which in some measure reflects a respect upon the part of the United States Government for the Government of Poland that in the *Pekarek* case, at least, we did not find extended to the Government of Czechoslovakia, or to the declarations of its officials. The evidence, it is true, indicates that this reliance by the United States Department of State upon the commitments of the Government of Poland may have developed later than 1954. The evidence was presented by defendants, however, to give greater credence to the certificate of the Polish Ambassador, dated in 1963, than was given to the similar certificate by the Czechoslovakian Ambassador in *Pekarek*. We think the evidence is entitled to that interpretation and that the certificate may be taken as true. If, as the evidence indicates, the Department of State has reason to accord credibility to the current representations of the officials of the Polish

People's Republic and act accordingly, we see no reason why a state court should, without any reason in fact, disbelieve an official declaration of the Polish Ambassador."

While the rejection of the Oregon Attorney General's efforts to escheat the inheritance of the Polish heirs was most gratifying to the heirs, and no doubt also to the officials of the Polish government, the clear fact is that it happened only because the court chose, for the reasons stated, to give credence to the representations of the Polish Ambassador which previously it had refused to give to the representations of the Czechoslovak Ambassador and other officials of the Czechoslovak government. This we submit, is a glaring example of a state's invasion of the exclusive function of the federal government to regulate the foreign relations of the United States.

9. *Zschernig v. Miller*, 243 Or. 567, 412 P.2d 781; 415 P.2d 15.

[Estate of Pauline Schrader, deceased]

The case at bar

This now brings us to a consideration of the case at bar in which invalidation on constitutional grounds of ORS 111.070 is sought. The Oregon Supreme Court's ruling that the 1954 treaty has no territorial application to the Soviet Zone is not being appealed here, nor the ruling that the 1923 treaty continues to have territorial application to the Soviet Zone of Germany. The court did not directly pass upon the issue squarely presented in the trial court as well as on

appeal that all three requirements of ORS 111.070 apply *either* to the country of which the foreign heir is an inhabitant *or* a citizen. Granting for the purposes of this discussion only that the Schrader heirs in the Soviet Zone are not inhabitants, that is residents of the Federal Republic of Germany, that government definitely regards them as having the same *citizenship* as those residing within the territorial limits of the Federal Republic. This is clearly evidenced by the certificate of the Foreign Office issued at Bonn on September 10, 1963, quoted at 243 Or. 567. It then follows—that the Schrader heirs are entitled to the inheritance rights provided in Article IX (3) of the 1954 treaty by reason of their citizenship, not their residence, under the alternate provisions of residence *or* citizenship in ORS 111.070. Indirectly, of course, the court rejected this line of argument with the statement that: (p. 575)

“It is the belief of this court that neither German citizenship nor nationality has real bearing on this issue because territorial application of the 1954 Treaty, by the terms of Article XXVI, is governed by sovereignty. . . .”

But we are not interested in the *territorial* application of the treaty. The Schrader heirs' claim does indeed rest on their *citizenship*, not on whether the treaty applies to the territory where they reside.

The point of all this is that the court has of necessity been obliged to involve itself in highly delicate political questions clearly belonging in the federal domain and with which no individual state of the union

should properly and may constitutionally concern itself. There is a serious transgression into the delicate field of foreign relations which should and can only be entrusted to the executive branch speaking and acting for the nation as a whole.

c. Review of the California reciprocity statute.

It is not deemed necessary to encumber this brief with quotation or extended discussion of the California reciprocity statutes inasmuch as a good deal has already been said and more will be said about them in the review of the decisions pertinent to this case. However, the emergency clause to give immediate effect to the first statute enacted in 1941, is of great interest:

"A great number of foreign nations are either at war, preparing for war or under the control and domination of conquering nations with the result that money and property left to citizens of California is impounded in such foreign countries or taken by confiscatory taxes for war uses. Likewise money and property left to friends and relatives in such foreign countries by persons dying in California is often never received by such nonresident aliens but is seized by these foreign governments and used for war purposes. Because the foreign governments guilty of these practices constitute a direct threat to the Government of the United States, it is immediately necessary that the property and money of citizens dying in this country should remain in this country and not be sent to such foreign

countries to be used for the purposes of waging war that eventually may be directed against the Government of the United States." [Cal. Stats. 1941, ch. 895]

On its face the statute was an attempt by the State of California to usurp, or at least to encroach upon the federal government's exclusive function to protect the nation from its enemies, actual or potential. How aptly indeed the Attorney General of the United States described it in *Bevilacqua's Estate*, 31 Cal. 2d 580, 161 P.2d 589, 593 (1945) as "not an inheritance statute, but a statute of confiscation and retaliation"; and later at page 75 of his brief in *Clark v. Allen* as "a recurrent source of diplomatic friction."

The original 1941 statute, § 259, read almost verbatim as the first two requirements of ORS 111.070, that is it covered both real and personal property, required foreign countries to grant United States citizens the same rights of inheritance as their own citizens and that United States citizens have the right to receive payment within the United States of their foreign inheritances. § 259.1 placed the burden of proof on the non-resident alien. § 259.2 provided for escheat if no heirs other than the proscribed alien were found eligible to take. In 1945 the statute was amended by eliminating the "right to receive payment" requirement, taking the burden of proof from the alien heir and providing for a disputable presumption of reciprocity [Cal. Stats. 1945, ch. 1160]. In 1947 the statute was again amended to eliminate the

presumption of reciprocity, in fact as amended the statute was in effect a reenactment of the original 1941 statute except that the "right to receive payment" requirement was not restored [Cal. Stats. 1947, ch. 1042]. The 1947 version has been in effect since then. Never has the California statute contained the "benefit, use or control" requirement which is the third one in ORS 111.070.

For a more thorough discussion of this subject, also of the decided cases, reference is made to Chaitkin, *The Rights of Residents of Russia and its Satellites to Share in Estates of American Decedents*, 25 So. Calif. L. Rev. 297 (1952), cited in Mr. Justice Douglas' dissent in *Ioannou v. New York*, 371 U.S. at 32.

d. Review of the pertinent California decisions.

1. *Schluttig's Estate*, 36 Cal. 2d 416, 224 P.2d 695 (1950).

1a. *Miller's Estate*, 104 Cal. App. 2d 1, 230 P.2d 667 (1951).

Space permits mention of only a few cases to demonstrate the chaos and tragic injustices which resulted from leaving the inheritance rights of aliens to the determination of local, parochial tribunals. The classic examples are *Schluttig's Estate*, where, on a great volume of documentary evidence and expert testimony the California Supreme Court ruled against reciprocity with wartime Germany, and *Miller's Estate*, where the District Court of Appeal soon there-

after ruled for reciprocity with wartime Germany on practically the same mountain of evidence and the California Supreme Court denied a hearing.

2. *Arbulich's Estate*, 41 Cal. 2d 86, 257 P.2d 433 (1953) (previous District Court of Appeal decision 248 P.2d 179).

2a. *Estate of Ivan Denis*, Los Angeles County, California, Superior Court No. 282,509.

Mention has heretofore been made of the *Arbulich* case where the brother and beneficiary in Yugoslavia lost his sizable inheritance to a brother in San Francisco in a California Supreme Court ruling against reciprocity, both in fact, and under treaty, although later this Court determined in *Kolovrat v. Oregon*, 366 U.S. 187, that inheritance rights of heirs or beneficiaries in Yugoslavia to American estates were assured by Article II of the 1881 treaty with Serbia. There will be pointed out here the comments on the conduct and remarks of the trial judge by the District Court of Appeal whose opinion (at 248 P.2d 179) Mr. Justice Carter of the California Supreme Court adopted as his dissent (257 P.2d at 440). Rather than setting forth here the extensive remarks of the court, it is most respectfully urged that this Court read the opinion starting with "on numerous occasions during the trial" in the lower right column on page 447 of 257 P.2d to "are entitled to great weight" at the middle of the right column on page 448. That eventually the brother in Yugoslavia, so energetically represented by the Consul General of that nation, was deprived of his inheritance must in

itself have been taken as a most serious affront to the country. But how much deeper the resentment over the offensive conduct and language of the trial court! Could this possibly have failed to produce a most adverse effect upon the relations between the United States and the aggrieved foreign nation!

Inasmuch as it is a matter of public record and the writer participated personally and actively in the trial of both cases, it is deemed proper to say here that immediately after the trial of *Arbulich* in San Francisco, there was tried before the Los Angeles County Superior Court the case of the *Ivan Denis* estate, register No. 282, 509, date of death May 9, 1948. In effect the identical evidence in support of reciprocity with Yugoslavia used in *Arbulich*, including the personal appearance and testimony of the Ambassador, was presented in *Denis*. On August 25, 1950, the Honorable Newcomb Condee in an extended memorandum opinion [in which he said "It is doubtful if a more complete record could have been made"] ruled for reciprocity and awarded the estate to decedent's parents and heirs. The Attorney General of California, who had sought the escheat of the estate, did not appeal.

3. *Gogabashvele's Estate*, 195 Cal. App. 2d 503, 16 Cal. Rptr. 77 (1961).

In 1961 the California District Court of Appeal ruled against reciprocity with the USSR (as of August 14, 1956) in the *Estate of Gogabashvele*, as result of which two children in the USSR of a pre-

deceased sister named as sole beneficiary in his will were deprived of a substantial estate appraised at over \$68,000. There was a most voluminous record with the usual mass of documentary evidence and the conflicting testimony of the experts. The opinion abounds with derogatory and disparaging remarks about the foreign country and government involved [see for instance the right column of page 89 of 16 Cal. Rptr.] A particularly intemperate statement is at the middle of the left column on page 90. Surely it requires no proof that such language cannot but have grave repercussions upon the relations of the United States with the country involved, entirely apart from the wound of having one of its nationals deprived of a substantial inheritance! As said by this Court in *Hines v. Davidowitz*, 312 U.S. 52 at 64 [quoted by Mr. Justice Douglas in his dissent in *Ioannou*, 371 U.S. at 32]:

“Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another’s subjects inflicted, or permitted, by a government.”

4. *Estates of Larkin and Terry*, 65 A.C. 49, 52 Cal. Rptr. 441, 416 P.2d 473 (1966).
- 4a. *Estate of Yarovikoff*, 52 Cal. Rptr. 459 (1966).

Only a few short years later the California Supreme Court solemnly disavowed the reasoning and rationale of practically every ground on which the Russian heirs were disenfranchised in *Gogabashvele*.

On August 2, 1966 (rehearing denied August 31, 1966) there were decided the *Estates of Larkin and Terry*, (also in a few-line companion opinion the *Estate of Yarovikoff*) ruling for reciprocity with the USSR. In these cases there was also a vast record of documentary evidence bearing on the written law and the actual practice of the USSR in matters of inheritance involving citizens of the United States. And there was the inevitable array of experts from both sides of the Atlantic, pro and con. Actually, from the standpoint of the case at bar the opinion is more impressive than the outcome because of the court's admonitions that the contentions made and rulings asked of the court by the state's Attorney General would "imperil the constitutionality of the statute." Quoting from 52 Cal. Rptr. at 456:

"Moreover, a construction of section 259 which would charge our courts with the duty of assessing the 'democracy quotient' of foreign states and the degree to which they pursue foreign policies consistent with our own would imperil the constitutionality of the statute. In *Clark v. Allen* (1946) 331 U.S. 503, 67 S. Ct. 1431, 91 L. Ed. 1633, the United States Supreme Court upheld the constitutionality of section 259 against a challenge that it represented a prohibited state venture into the field of foreign affairs. The court rejected as 'farfetched' the contention of the challengers that the California Legislature had undertaken to stimulate foreign states to extend reciprocal inheritance rights to our citizens, a matter clearly within the exclusive competence of the federal government. The court considered

that any effect which the statute might have on foreign countries was merely 'incidental.'

"The commentators have seriously criticized the reasoning of the *Clark* decision. One writer declares that the court 'grossly underestimate[d] the effect of the California statute on foreign relations' and that the decision is inconsistent with prior and subsequent court rulings. (Boyd, *The Invalidity of State Statutes Governing the Share of Nonresident Aliens in Decedents' Estates* (1963) 51 Geo.L.J. 470, 493-500; cf. Hawley, *Succession*, 1964 Annual Survey of American Law 585, 591.)

"Similarly, Justice Douglas, himself the author of *Clark*, has declared that he believes the time has come to reconsider the rationale of that decision in light of the 'notorious' practice of certain state courts 'in withholding remittances to legatees residing in Communist countries' and thus affecting the foreign relations of this country in a manner not justified by any legitimate state interest in regulating the local aspects of inheritance. (*Ioannou v. New York* (1962) 371 U.S. 30, 83 S. Ct. 6, 9 L. Ed. 2d 5, per curiam dismissal of appeal, Justices Douglas and Black voting to note jurisdiction, opinion by Justice Douglas.) Whatever the present status of the *Clark* decision, the construction of section 259 for which the Attorney General contends in the present case goes well beyond that deemed 'far-fetched' in *Clark*.

"Accordingly, we conclude that the allusion in *Gogabashvele* to the particular structure and policies of the Soviet Union introduces factors which

section 259 and the United States Constitution exclude from our consideration."

and from page 459:

"Whatever our reaction to the methods of the Soviet Union or to its policies, we must scrupulously confine ourselves to the issues raised by our statute and permit the resolution of questions of foreign policy to rest with the federal government. To allow such considerations to flavor our decision would be to endanger the constitutionality of the statute and unduly to extend the province of this court."

5. *Estate of Chichernea*, 66 A.C. 74, 57 Cal. Rptr. 135, 424 P.2d 687 (3/8/67).

Still more recently the California Supreme Court reversed a Los Angeles County Superior Court and a District Court of Appeal decision (53 Cal. Rptr. 535) against reciprocity with Rumania, closely following its reasoning and holdings in the *Larkin, Terry, Yarovikoff* cases. The date of death was April 15, 1958, and the testatrix' daughter, grandchildren, niece and son-in-law, the beneficiaries under her will, were all citizens and residents of Rumania. Here again the Attorney General of California sought the escheat of the estate on a denial of reciprocity under PC § 259.

Speaking of the Rumanian foreign funds controls and foreign funds control laws and regulations generally, which the state's Attorney General contended [and the Oregon Supreme Court has repeatedly held] rendered American heirs' receipt of foreign inheritance permissive and discretionary rather than a

matter of right, the court said: (57 Cal. Rptr. at 150)

"The restrictions vary widely in their terms, and many are obscurely phrased. Surely this court cannot undertake to assess the nature and operation of all such restrictions in order to determine which are so onerous as to defeat reciprocity. For us to embark upon any such adventure *would gravely imperil the constitutionality* of section 259 by involving our courts in matters of international monetary policy which may be within the exclusive province of federal authority. (See *Ioannou v. New York* (1962) 371 U.S. 30, 83 S. Ct. 6, 9 L. Ed. 2d 5 (Douglas, J., dissenting); *Kolovrat v. Oregon* (1961) 366 U.S. 187, 195-198, 81 S. Ct. 922, 6 L. Ed. 2d 218; cf. *Clark v. Allen* (1947) 331 U.S. 503, 517, 67 S. Ct. 1431, 91 L. Ed. 1633.)

"In any event, even if we were disposed to reintroduce into the statute a *possibly unconstitutional condition* expressly removed by our Legislature, we could hardly give that condition a more demanding construction than it bore when it was an express part of the Probate Code." (Emphasis ours)

It will be seen, therefore, that the California Supreme Court in both *Larkin* and *Chichernea* directly and seriously questioned the constitutionality of the "right to receive payment" requirement which is subsection (1)(b) of ORS 111.070. It was of course directly on basis of this requirement that the Oregon Supreme Court ruled against reciprocity in *Rogers*, *Kolovrat*, etc., *supra*, holding that the foreign funds control laws and regulations, adopted by practically

all nations of the world [by no means excepting the United States], "stand as a bar to the right of an American heir of an Estonian estate to ultimately and with legal certainty receive payment of his legacy in the United States. . . ." (*Kasendorf*, supra, 222 Or. at 479). Appellants do therefore have the direct support of the Supreme Court of the State of California in their attack upon the constitutionality of ORS 111.070.

e. Review of Montana reciprocity statutes.

Montana is of interest for two reasons, firstly because in one respect its reciprocity statutes are even more confiscatory than Oregon's and California's, secondly because of extremely intemperate language in some of its Supreme Court opinions.

Section 91-520, Section 2, Revised Code of Montana, 1947, as originally enacted as Ch. 104, Laws of 1939, provided that

"No person shall receive money or property * * * as an heir, devisee and/or legatee of a deceased person * * * if such heir, devisee and/or legatee, at the time of the death of said deceased person is not a citizen of the United States and is a resident of a foreign country at the time of the death of said intestate or testator unless, reciprocally, the foreign country in question would permit the transfer to an heir, devisee and/or legatee residing in the United States, of property left by a deceased person in said foreign country."

This is of course very similar to the "right to receive payment" requirement of ORS 111.070 (1) (b) and the second part of California's original PC 259 as enacted in 1941. The very important difference is that rather than providing for the inheritances of proscribed aliens going to other, "eligible" heirs and for an escheat only if there are no other "eligible" heirs, the Montana statute provided, and still provides, for the escheat of the legacy, devise or distributive share of the ineligible heir or beneficiary. For example, under the Oregon type of statute if the heirs were a brother in the United States and a brother in, let us say Albania, the American brother would receive the whole estate whereas in Montana the Albanian brother's one-half share would escheat to the state.

By Chapter 31, Laws of 1951, the following subsection was added:

"In order to prove reciprocity the alien heir * * * must establish by competent evidence produced at a hearing to determine heirship; (a) that such foreign country recognizes the right of United States citizens to inherit property left by a deceased person in such foreign country; (b) that such foreign country places no restrictions upon the movement of money or property out of such foreign country to an heir, devisee and/or legatee residing in the United States."

This then introduced the element of reciprocal rights of inheritance and changed, but not materially, the language of the "right to receive payment" requirement to require proof that the foreign country

"places no restriction upon the movement of money or property out of such foreign country to an heir, devisee and/or legatee residing in the United States." Obviously this would include every country which in one form or another exercises foreign funds control and whose currency is not wholly, freely and immediately convertible. The escheat provision was not changed.

The statute was once more amended by Chapter 144, Laws of 1953, but the original 1939 statute plus the 1951 addition were left intact. There were added four sections, the first of which provides that where the proof showed that the alien heir's country recognizes the right of inheritance (of United States citizens) but restricts the movement of money or property out of the country, then the foreign heir's inheritance is to be paid to the State Treasurer in trust subject to the same conditions or restrictions imposed by the foreign country. A very complex recovery proceeding is provided which must be commenced within three years of "the date the trust was created," in absence of which "such trust funds shall forthwith escheat to the state of Montana." Further details are unimportant. In essence the Montana statute since 1953 requires reciprocity of inheritance rights and an American heir's right to immediate, unrestricted payment of his inheritance from a foreign country.

f. Review of the pertinent Montana decisions.
There has not been a great volume of reciprocity

litigation in Montana but what there has been necessitated the heirs, particularly those in the eastern European countries, asserting or defending their rights in the Supreme Court. The opinions are replete with strong language in respect to the "Iron Curtain."

1. In *Stoian's Estate*, 128 Mont. 52, 269 P.2d 1085 (1954), the two dissenting opinions are mild but nevertheless critical of the foreign country's regime.

2. In *Spoja's Estate*, 129 Mont. 83, 282 P.2d 452 (1955) the dissenting opinion spoke so disparagingly of the regime and of the Consul General of the country involved that the majority of the court were moved to apologize in a supplemental statement (282 P.2d at 458) for the inference of the dissent that the foreign heirs' government was irresponsible, concluding with the statement that:

"Such a possible inference belies the integrity of the diplomatic and economic functions of our Federal Government."

3. In *Ginn's Estate*, 136 Mont. 338, 347 P.2d 467 (1959) the minority delivered a lengthy and unbridled diatribe against the regime and government of the foreign heirs' country (347 P.2d 471-3). Such vitriolic castigation emanating from the highest court of an American state would certainly not go unnoticed at the embassy and in the capital of the offended country, particularly inasmuch as the foreign heirs were represented by their Consul General, and

would certainly not add warmth to the relations between the United States and that country.

4. In *Spehar's Estate*, 140 Mont. 76, 367 P.2d 563 (1961) the trial court, despite two rulings by the Montana Supreme Court in favor of reciprocity with Yugoslavia (*Spoja*, supra, date of death 5/8/49, and *Ginn*, supra, date of death 5/30/55, date of death in *Spehar* 9/13/54) ruled against reciprocity and ordered the legacies of the Yugoslav relatives escheated to the state of Montana. Very fortunately there meanwhile came down the decision of this Court in *Kolovrat v. Oregon*, 366 U.S. 187 (5/1/61) holding that reciprocity with Yugoslavia was provided by the 1881 Serbian treaty, which of course resulted in reversal and the Yugoslav legatees eventually receiving their bequests. But it did require an arduous and costly appeal to save their rights and to bring this about.

5. In *Hosova's Estate*, 143 Mont. 74, 387 P.2d 305 (1963) the Supreme Court reversed a trial court ruling against reciprocity with Czechoslovakia. However the date of death was June 10, 1946, so the case came under the original, least demanding 1939 statute and under the Czechoslovak law as it was prior to and for some three years after World War II. Nevertheless the majority opinion (in the right column on page 310 of 387 P.2d) made some rather pointed political observations and in effect voiced a recommendation that a provision like the right to take "without confiscation in whole or in part" requirement of ORS 111.070 be added to Montana's reciprocity statute.

There was one dissent based on previous dissents in *Stoian* and *Spoya* but of particular interest is a specially concurring opinion (at p. 311) in which severely critical sentiments, much more political than judicial, were voiced in explanation of "reluctance and repugnance" to concur in the majority decision.

Here again it was necessary for the foreign heirs to go through an arduous and costly appeal to save their rights from escheat to the State of Montana.

A great volume of reciprocal inheritance rights litigation involving particularly of course the eastern European countries is still pending in the courts of Montana. New cases are constantly arising because of the sizable foreign colonies in that state, composed particularly of ethnically Slavic groups, but if this attack on ORS 111.070 should terminate successfully it may be anticipated that Montana's § 91-520 will likewise eventually fall.

g. Review of reciprocity statutes of other states.

It is not deemed necessary to detail either the statutes or adjudicated cases in other states which have adopted reciprocity statutes such as Oregon's ORS 111.070 or California's PC § 259, which, in the literature on the subject, are usually referred to as the "western" statutes. Most of them have the confiscatory escheat provisions in the event the foreign country does not meet the conditions laid down in the statute or, it may be better said, as the individual probate judges or, on appeal, the higher courts of the

state see fit, at any given time, to interpret and apply the statute. At present a wave of liberal construction seems to flow through the California decisions, but we have seen that it has not always been so and tomorrow's headlines may change the picture completely. The few cases which reach the appellate courts tell only a small part of the story, as pointed out in *Chaitkin's* treatise [supra, 25 So. Calif. L. Rev. 297]. Most of the inheritances lost by foreign heirs are far too small to stand the tremendous expense of a full-fledged reciprocity showing, or the inheritances have been lost by escheat before the foreign heirs can—even if able—do something to assert their rights.

Painstaking research has been made in an effort at maximum accuracy but there could conceivably be an undetected error or omission in the following alphabetical list of other states with reciprocity statutes (as distinguished from the so-called "eastern" statutes providing only for postponement of distribution until it is shown that the foreign heir would have the "benefit, use or control" of his inheritance):

Arizona Rev. Stat. Ann. § 14-212.

Connecticut Gen. Stat. Rev. § 47-57 (real property only).

Iowa Code Ann. § 567.8 (like California's PC § 259).

Nebraska Laws of 1963, c. 21 § 1, p. 104, § 4-107, R. S. Supp. 1965 (like Oregon's ORS 111.070 with ramifications)

Nevada Rev. Stat. §§ 134.230-250 (similar to California's PC § 259).

North Carolina Gen. Stat. § 64-3 (like Cali-

for California's PC § 259).

Oklahoma Stat. tit. 60, § 121 (personal property only)

Texas Rev. Civ. Stat. art. 167(4) (real property only)

h. Review of reciprocity litigation in other states.

Actually there has been only little contested reciprocity litigation in the states other than California, Montana and Oregon and to analyze and discuss their court decisions would only be cumulative and unduly extend this brief.

i. The so-called "eastern" withholding statutes.

It is also not deemed necessary to discuss the so-called "eastern" statutes — and the court decisions thereunder—which are not in fact confiscatory or punitive in their terms or effect but give the probate judges authority and discretion to withhold and defer actual delivery or payment of inheritances to foreign heirs until the court is satisfied that the foreign heir will in fact receive the full "benefit, use or control" of the money or other property. Typical such statutes are:

New York Surrogate's Court Act § 269 a.
(1939).

Pennsylvania Act of July 28, 1953, P. L. 674,
section 2, 20 P.S. § 1156 (1953).

New Jersey Stat. Ann. 3 A:25-10 (1953).

Massachusetts Ann. Laws, ch. 206, § 27 a
(1955).

Rhode Island Gen. Laws § 33-13-13 (1956).

Maryland Ann. Code art. 93, § 161 (1957).

j. *Ioannou v. New York*, 371 U.S. 30, compared to case at bar.

New York's statute has been twice before this Court, firstly in *re Braier*, No. 123, 1953 Term, 305 N.Y. 148, 111 N.E. 2d 424, app. dism. *sub nom. Kalman v. Greene*, 346 U.S. 802, Justices Black, Burton and Douglas voting to note jurisdiction, secondly in *Ioannou v. New York*, No. 191, October term, 1962, 11 N.Y.2d 740, 181 N.E.2d 456, appeal dismissed for want of a substantial federal question, dissenting opinion by Mr. Justice Douglas, with whom Mr. Justice Black concurred, 371 U.S. 30. It is therefore deemed advisable to briefly compare *Ioannou* with the case at bar to demonstrate clearly—although such demonstration is hardly needed—that there is in fact little resemblance between the two.

The New York statute, as we already well know, merely defers distribution but does not in any way diminish or take away, much less confiscate, the foreign heir's inheritance. Undoubtedly it had a worthy purpose and accomplished much good during the religious and racial persecutions of the pre-war years of nazi domination of Germany. It can well be argued that the New York courts tortured the statute far beyond its original aims and intents in *Ioannou*. Be that as it may, it has no remote resemblance to Oregon's ORS 111.070 which once and for all and forever takes away the inheritance of the foreign heir found ineligible on just any one of the three grounds [*State Land Board v. Pekarek*, *supra*, 234 Or. at 79, where

the court said that "If the legatees fail to establish any one of the conditions stated in subparagraphs (a), (b) and (c) of subsection (1) the property will escheat to the state." Oregon's § 111.070 is indeed what the United States Attorney called California's PC § 259—actually far less demanding than Oregon's—"not an inheritance statute, but a statute of confiscation and retaliation." (*supra*, p. 39).

It may be pointed out that in *Ioannou* the foreign heirs were citizens and residents of Czechoslovakia whereas in the case at bar they are German citizens residing in the Soviet-occupied zone of Germany.

k. *In re Belemecich's Estate*, 411 Pa. 506, 192 A.2d 740 (1963)

Certiorari granted, judgment reversed 375 U.S. 395, on authority of *Kolovrat v. Oregon*, 366 U.S. 187.

This case is deemed worthy of special mention because it demonstrates so graphically the temptations which even so mild a withholding statute as Pennsylvania's Act of July 28, 1953 (its so-called "Iron Curtain Act" fully cited *supra*) offers to local, parochial courts, and even to the highest court of a great state, to indulge in unbridled, intemperate political polemics and name-calling. As on earlier occasions herein we shall refrain from specific citation or quotation, but in fact nearly all the opinion is so vituperative that most any portion or paragraph might have served as basis for a diplomatic protest. Certainly in this instance even the mild Pennsylvania statute has been

interpreted and applied in a manner constituting direct "interference on the part of" a state in international affairs, complete power over which "is in the national government." *United States v. Belmont*, 301 U.S. 324, 331, cited in *Ioannou*, 371 U.S. at 31.

1. Conclusion to Point I.

The temptation is great at this point to close this brief in confident belief that it has been amply, glaringly demonstrated that ORS 111.070 as the statute has been interpreted and applied by the courts of the state of Oregon does indeed transgress in an intolerable manner upon the "delicate field" of foreign relations constitutionally forbidden to the individual states and entrusted solely to the Federal Government. We have in fact gone much farther and shown like transgression by at least two other states, California and Montana, and under an analogous but much milder statute, by the State of Pennsylvania. We feel, however, that we must proceed on to two further points, but are determined to limit the discussion to a minimum consistent with what we deem to be our obligation to the Court and the heirs of Pauline Schrader, deceased.

Point II

This Court's decision in *CLARK v. ALLEN*, 331 U.S. 503 (1943), upholding the constitutionality of the California reciprocal inheritance rights statute is not determinative of the constitutionality of the Oregon statute in light of the events of the past twenty years.

In California, where *Clark v. Allen* originated,

the reciprocity litigation involving PC § 259 did not, except for isolated cases such as *Blak's Estate*, 65 Cal. App. 2d 232, 150 P.2d 567 (1944), begin to reach the appellate courts until the late 1940's, after the constitutionality of the statute had been declared in *Clark*. In Oregon the first reciprocity case requiring interpretation and application of the reciprocity statute was *Krachler*, supra, in 1953, where, however, the legislative intent was not discussed. Not until *Closterman v. Schmidt*, reviewed earlier herein, decided in 1958, did the Oregon Supreme Court say, in respect to the purpose of the statute that: (215 Or. at 68)

"It was, in a sense, an inducement to foreign nations to so frame the inheritance laws of their respective countries in a manner which would insure to Oregonians the same opportunities to inherit and take personal property abroad as they enjoy in the state of Oregon."

This was in fact tantamount to the State of Oregon proposing to the nations of the world a compact, an agreement that they conform their inheritance laws to Oregon's, whereupon their nationals could continue to inherit in Oregon. The penalty for failure to conform was to bar the foreigners from inheriting in Oregon—in fact not only bar them but the state would (in the absence of "eligible" relatives outside the foreign country) confiscate the inheritances via the vehicle of escheat. This is of course in direct violation of the prohibition in Article I, Section 10 of the U. S. Constitution against any state entering

"into any Agreement or Compact with another State, or with a foreign Power." In fact a state may not in any way communicate or negotiate with a foreign government on any sort of an arrangement.

On the second, the "right to receive payment" requirement, the proposal, perhaps better called a demand, of the State of Oregon was that the foreign country either refrain from adopting, or, if it had adopted, that it abolish any foreign funds controls which might prevent, or perhaps only delay, an American heir receiving remittance of his inheritance from the foreign country. That such controls had been imposed and were being exercised pursuant to an international agreement sponsored by the United States mattered not (*State Land Board v. Kolovrat*, supra, 220 Or. at 472, disposing of The Bretton Woods Agreement). The penalty for failure was the same, deprivation of the foreigner's Oregon inheritance.

On the third, the "benefit, use or control" requirement, Oregon's proposal, or demand, was that the foreign country abdicate its sovereign authority to impose upon its own citizens, within its own borders, such limitations as it might deem meet on their "benefit, use or control" of inheritance funds or other property coming to them from estates in Oregon. Once again the penalty for failure to submit to this condition—in fact to submit to any one of the three conditions—was deprivation of the foreigner's Oregon inheritance.

Article I, Section 8 of the U. S. Constitution dele-

gates to the Congress the power to "regulate Commerce with foreign Nations. . . ." The word "Commerce" includes the transmission of funds from the United States to foreign countries and, of course, in the reverse direction. Assuming that the foreign heir's right to inherit from an Oregon estate has otherwise been established, may the State of Oregon then say that the legacy cannot be sent to him, but will be taken from him, perhaps escheated to the state, because the heir's government imposes certain controls on sending inheritance money out of the country, or because it imposes certain restrictions on the heir's "benefit, use or control" of the money after the heir receives it from Oregon? We submit that this clearly constitutes unauthorized interference by Oregon with the exclusive federal power to regulate the commerce of the United States with foreign nations. And further, it constitutes depriving the heir of his property without due process of law in violation of the due process and equal protection clauses of the Fourteenth Amendment to the U. S. Constitution.

While ORS 111.070 in its first two requirements is substantially the same as California's PC § 259 was at the time of the decedent's death in *Clark v. Allen*, that is in 1942, there was not then in PC § 259—nor has there ever been—the very far-reaching third requirement of ORS 111.070, the right to the "benefit, use or control" * * * "without confiscation, in whole or in part, by the governments of such foreign countries." It was on this requirement alone that the decedent's children in Czechoslovakia lost

their inheritance by escheat in *Pekarek*, supra. Therefore the case at bar involves a far broader, harsher statute than was before this Court in *Clark v. Allen*.

By 1947 not a single state court had uttered the intemperate, derisive, defamatory, even contemptuous statements about the foreign governments involved, about the credibility, character and integrity of their officials up to the highest level, with which the cases hereinabove reviewed abound. Nor did this Court, while considering and deciding *Clark v. Allen*, have any reason to even suspect, let alone anticipate, that the future course of reciprocity legislation and litigation would be what in fact occurred. As stated in *Nashville C. & St. L. Ry. v. Walters*, 294 U.S. 405, 415:

"A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied."

It may be added that a state statute may be invalidated by the manner in which it is interpreted and applied by the officials and/or the courts of the state. If such interpretation and application results in the state interfering with the exclusive federal power to regulate the foreign policy, the foreign relations or the foreign commerce of the United States, or results in depriving any person of his property without due process of law or in denying any person within its jurisdiction the equal protection of the laws, then the statute is in violation of the Constitution of the United States and cannot be given effect.

As noted in the review of the reciprocity decisions *supra*, the lower and appellate courts have said time and again, as the trial court and the Oregon Supreme Court said in the case at bar, that they must consider the constitutional validity of the reciprocity statutes settled by *Clark v. Allen*. As the probate judge here said after citing *Clark v. Allen*: (R. 11)

"If the rules of law announced in that case should be changed because of changed conditions in the world or for political reasons, the Congress or the Supreme Court of the United States should revise the laws, certainly not this Probate Court."

That hour is indeed come. For the reasons stated appellants do urge that this Court reconsider and revise its holding in *Clark v. Allen* in light of the events and the change of conditions during the past two decades.

Point III

The "Act of State" doctrine declared in *BANCO NACIONAL DE CUBA v. SABBATINO*, 376 U.S. 398 (1964) is by analogy applicable to any regulation of the inheritance rights of nonresident aliens in estates in the United States that may be deemed and found to be in the public interest.

It was held in *Terrace v. Thompson*, 362 U.S. 197, 218 (1923) that:

"State legislation applying alike and equally to all aliens, withholding from them the right to own land, cannot be said to be capricious or

amount to an arbitrary deprivation of liberty and property, or to transgress the due process clause."

This is in support of our proposition that any state may with propriety enact a statute barring *all*, as distinguished from only *some*, nonresident aliens from inheriting within the state. A proper legislative purpose is assumed. However, it was held in *Nebbia v. New York*, 291 U.S. 502, 537 (1934):

"If the laws passed are seen to have a reasonable relation to a proper legislative purpose and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio."

In the discussion under Point II we have shown that the legislative purpose of ORS 111.070 as declared by the Oregon Supreme Court is not only improper but beyond the constitutional power of the state as it directly involves the foreign relations of the United States. That the statute is arbitrary and discriminatory has been demonstrated beyond question. The emergency clause of the original California reciprocity statute, quoted at page 38 *supra*, on its face declares an improper legislative purpose beyond the state's constitutional power. Inasmuch as Oregon in ORS 111.070, enacted in 1951, adopted California's original statute almost verbatim — adding however the third "benefit, use or control" requirement—the same legislative purpose may be imputed to Oregon's 111.070 that was declared for its prototype in 1941.

It has certainly been demonstrated that this legislative intent to retaliate against and penalize those nations who do not conform to the demands and conditions laid down by the state in the statute has been consistently and persistently carried out by the Oregon Supreme Court in its decisions interpreting and applying ORS 111.070 and its predecessor § 61-107, OCLA. The same applies to Montana as well as California, except possibly for the very recent change of posture indicated in the *Larkin/Terry* and *Chichernea* decisions, *supra*.

In *Banco National-de Cuba v. Sabbatino*, 376 U.S. 398 (1964) it was held that no individual state may impose its own construction and its own exceptions upon the "Act of State" doctrine, that the scope of the "Act of State" doctrine must be determined by federal law (p. 427). Not even the Federal Government, much less any individual state, may "sit in judgment" on the laws or other "acts of state" of a sovereign foreign state. As quoted in *Sabbatino* at 416 from *Underhill v. Hernandez*, 168 U.S. 250, 252:

"Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

No state of the Union may decide for itself whether or not to give recognition to the foreign funds control

laws and regulations of a sovereign foreign country, or, because of such laws or regulations, penalize residents and nationals of such foreign country by depriving them of rights of inheritance which they would otherwise have in that state. This applies with equal force to any laws or regulations of the foreign country which the officials or courts of the American state might conclude [as the Oregon Supreme Court concluded in *Pekarek*, supra,] constitute "confiscation, in whole or in part," of the inheritance due the foreign heir from an American estate.

Under the "Act of State" doctrine and the law declared in *Sabbatino*, no individual state may lay down and impose its own restrictions and conditions for granting to or withholding from nonresident aliens rights of inheritance within its borders. If conditions be or in the future become such that the rights of inheritance of nonresident aliens should be restricted or regulated, it is a matter of national interest, equally as much to Florida as to Oregon, to Maine as to California, and belongs as much within the scope of the "federal common law" as the "Act of State" doctrine. Just as foreign countries determine the rights of aliens, including rights of inheritance, on a national, nation-wide basis, so such rights must—to remedy and end the chaos which has developed over the past twenty years or more—be determined on a nation-wide basis in the United States by uniform federal dictum in conformity with federal policy and in furtherance of the foreign relations of the

United States. As said by this Court in *Hines v. Davidowitz*, 312 U.S. 52 (1941) at 63:

"The Federal Government, representing as it does the collective interests of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. 'For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.' Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference. As Mr. Justice Miller well observed of a California statute burdening immigration: 'If [the United States] should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all of the Union?'"

If any foreign country refuses to grant our citizens rights of inheritance, if it arbitrarily refuses to permit transmission of the inheritances of our citizens from estates within the foreign country although financially able to do so, these are properly subjects for communication between the two governments through the established diplomatic channels. The individual states should not, may not constitutionally enter upon this field. If diplomatic measures fail, the Federal Government has ample means and measures at its disposal—such as, for example—what was done in respect to Cuba whose assets in the United States were "frozen."

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It is deemed unnecessary to extend the discussion further. On the direct application of the principles of law declared in *Sabbatino* to the case at bar, reference is respectfully made to the analysis of and comments on *Sabbatino* by Louis Henkin, Professor of International Law and Diplomacy at Columbia University, in 64 *Columbia Law Review* 805 (1964), under the title "The Foreign Affairs Power in the Federal Courts."

Reference has heretofore been made (at p. 45, *supra*) to the exhaustive treatise entitled "The Invalidity of State Statutes Governing the Share of Non-resident Aliens in Decedents' Estates" in Vol. 51, p. 470 of *The Georgetown Law Journal* (1963) by Professor Willard L. Boyd of the College of Law, University of Iowa (now Vice-President for Academic Affairs and Dean of the Faculties at the University of Iowa). Professor Boyd has written extensively on kindred subjects [51 *Mich. L. R.* 1001 (1953); 47 *Iowa L.R.* 29 (1961); 47 *Iowa L.R.* 823 (1962)].

There is of course the treatise by Chaitkin in 25 *So. Cal. L.R.* 297 (1951-2) mentioned *supra*. In Vol. 18, p. 329 of the *University of Chicago Law Review* (1950-51) is "State Regulation of Nonresident Alien Inheritance—an Anomaly in Foreign Policy." Other articles of particular interest are "Soviet Heirs in American Courts," 62 *Col. L.R.* 257 (1962) by Professor Harold J. Berman of Harvard University who

discusses at length the human element in reciprocity litigation, the personal views, convictions, temperaments and prejudices of the judges, particularly at the first, that is the probate court level, and relates numerous instances where probate judges, by highly uncomplimentary remarks about the governments or officials of the "Iron Curtain" countries, made it clear that their decisions were motivated largely if not wholly by their personal views and sentiments; Comment—"State Reciprocity Statutes and the Inheritance Rights of Nonresident Aliens," Vol. 1963, 315, Duke Law Journal; Ehrenzweig's "Treatise on the Conflict of Laws" where, at p. 668, he points to the "host of inconsistent decisions brought on by the reciprocity statutes" and says that "Only outright abolition of these objectionable statutes can eliminate this expensive and demoralizing confusion"; and Comment—"International Law—Inheritance by Nonresident Aliens in Oregon; the Oregon Statute, the Effect of Treaties and the Federal Law" in the Oregon Law Review, Vol. 65, No. 3, p. 221 which particularly discusses, and criticizes, the decision of the Oregon Supreme Court in this *Schrader (Zschernig v. Miller)* case, and points out the relevancy of this Court's decision in *Sabbatino*.

All of the above treatises and comments fully support every contention, proposition and principle of law urged by appellants in this case and argued under the three points in this brief.

CONCLUSION

The decision of the Supreme Court of the State of Oregon should be reversed, the Oregon reciprocity statute Section 111.070, Oregon Revised Statutes, declared repugnant to the cited provisions of the Constitution of the United States and therefore invalid and of no effect, and the heirs of Pauline Schrader held entitled to inherit the whole of her estate, real and personal.

August 23, 1967

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1907

No. 21

In the Matter of the Estate of
PAULINE SCHMIDT, Deceased

OSWALD SCHMIDT, MINNA PABEL, OLGA BERTA WINKLER,
ALFRED ROSTER, JOHANNA BLASCHKE and HANS FURBER,
Appellants

vs.
WILLIAM S. MILLER, Administrator of the Estate of Pauline Schmidt,
Deceased, MARK O. HAYFIELD, TOM MCCALL, and ROBERT W.
STRAUB, respectively the Governor, Secretary of State and State
Treasurer of Oregon, constituting the STATE LAND BOARD OF
OREGON, and all persons concerned or interested, having or claiming
any interest in the Estate of Pauline Schmidt, Deceased.
Appellees

APPEAL FROM THE SUPREME COURT OF THE
STATE OF OREGON

BRIEF OF APPELLEE
STATE LAND BOARD OF OREGON

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 21

In the Matter of the Estate of

PAULINE SCHRADER, Deceased

OSWALD ZSCHERNIG, MINNA PABEL, OLGA HERTA WINCKLER,
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Appellants,

v.

WILLIAM J. MILLER, Administrator of the Estate of Pauline Schrader,
Deceased, MARK O. HATFIELD, TOM McCALL and ROBERT W.
STRAUB, respectively the Governor, Secretary of State and State
Treasurer of Oregon, constituting the STATE LAND BOARD OF
OREGON, and all persons unnamed or unknown having or claiming
any interest in the Estate of Pauline Schrader, Deceased,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE
STATE OF OREGON

BRIEF OF APPELLEE
STATE LAND BOARD OF OREGON

OPINIONS BELOW

The opinion of the Supreme Court of Oregon
(R. 14-34) is reported at 243 Or. 567, 412 P.2d 781,
rehearing denied, 243 Or. 592, 415 P.2d 15 (R. 35-36).

The opinion, findings and order of the Circuit Court
of Multnomah County, Oregon, Probate Department,
(R. 9-13) were not reported.

JURISDICTION

The opinion (R. 14-34) and order (R. 34-35) of the Supreme Court of Oregon were issued March 23, 1966, and the petition for rehearing (R. 35-36) was denied June 3, 1966. Notice of appeal to this Court was filed August 31, 1966 (R. 37-39). Probable jurisdiction of this Court was noted May 8, 1967 (R. 40). Appellants invoke the jurisdiction of this Court under 28 U.S.C. § 1257(2).

QUESTIONS PRESENTED

1. Does Section 111.070 of Oregon Revised Statutes unconstitutionally interfere with the foreign relations power of the federal government by requiring East German heirs of an Oregon decedent to establish the conditions of their eligibility to take in the absence of an applicable treaty or other overriding federal policy?

2. Was the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany essentially abrogated by Article XXVIII of the 1954 Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany?

STATUTE, CONSTITUTION AND TREATY PROVISIONS INVOLVED

The relevant provisions of Oregon Revised Statutes, Section 111.070; portions of the Constitution of the United States, from Article I, Sections 8 and 10 and the Fourteenth Amendment; portions of the 1923 Treaty of Friendship, Commerce and Consular Rights between the United States and Germany; notes dated June 2, 1953,

between the Secretary of State of the United States and the Charge d'Affaires of the Federal Republic of Germany; portions of the Agreement dated June 3, 1953, concerning the 1923 Treaty of Friendship, Commerce and Consular Rights between the United States and Germany; and a portion of the 1954 Treaty of Friendship, Commerce and Navigation between the United States and the Federal Republic of Germany are set forth in the Appendix, *infra*. pp. 24-31.

STATEMENT

This case concerns the disposition of the assets of the estate of Pauline Schrader, a widow, resident of Portland, Oregon, who died there intestate, on September 30, 1962.

The appellants, hereafter called heirs, are the decedent's sole heirs and are residents of the Soviet Zone of Germany (East Germany). The Appellee, State Land Board of Oregon, petitioned the probate department of the Circuit Court of Multnomah County, Oregon for the escheat of the net proceeds of the estate under the provisions of ORS 111.070 (R. 2-3).

Thereafter the heirs filed their petition to determine heirship to obtain distribution of the estate (R. 3-7). The answer of the State of Oregon essentially denied the allegations of the heirs (R. 7-8). The reply of the heirs (R. 9), alleged the invalidity of ORS 111.070 as an unconstitutional invasion of the power of the Federal Government to regulate foreign relations and as a violation of the policy of the Federal Government.

The circuit court ordered the escheat of the estate to the State of Oregon, having found that there were no treaties applicable to the case; that ORS 111.070 was not an unconstitutional invasion by the state of the power of the Federal Government to regulate foreign relations; and that the heirs had not established the reciprocity required by ORS 111.070 (R. 9-13).

On the appeal, the Supreme Court of Oregon modified the order of escheat (R. 33-34) by declaring the heirs to be eligible to inherit the real property of the decedent under the provisions of Article IV of the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany (App., *infra*, p. 26), which the court found to be still in existence with respect to East Germany. The court found that the 1923 Treaty as applied to East Germany was not affected by Article XXVIII of the 1954 Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany (App., *infra*, pp. 30-31) (R. 20).

The Supreme Court of Oregon upheld the circuit court as to its decision regarding personal property in its application of ORS 111.070 (R.30). This decision was based wholly upon *Clark v. Allen*, 331 ~~US~~ 503. The Oregon Supreme Court held that the 1923 Treaty was not applicable to personal property, of an American citizen, situated in the United States when the proposed distributee is a German national (R. 29-30). The Oregon Supreme Court also found that ORS 111.070 was not an unconstitutional attempt to invade the Federal Government's power to regulate foreign relations, while recog-

nizing the supremacy of an overriding federal policy regarding the descent and distribution of property to nonresident aliens (R. 30-31).

SUMMARY OF ARGUMENT

It is the position of the State of Oregon that inasmuch as the devolution of decedents' property within a state is subject to statutory regulation by the states, the requirements of ORS 111.070 (App., *infra*, p. 24) for eligibility of nonresident alien heirs or distributees are not an unconstitutional attempt by the State of Oregon to interfere with the right of the Federal Government to regulate foreign relations.

The supremacy of federal treaties or other policy is recognized, but in the absence of any showing of direct and substantial effect of such statute upon foreign relations the right of states to regulate the succession to decedents' property should not be limited. Moreover, when as here the State Department denies that such statutes have affected foreign relations it appears that the policy of the government is to allow the states to continue to regulate such matters.

The "Act of State" doctrine is not applicable, even by analogy, to this case for it proscribes a state from examining the internal acts of a recognized sovereign foreign state regarding the validity of the acts. Here not only are there problems relating to recognition but of greater significance, the state is not examining the internal act of a sovereign foreign state concerning its validity but is only looking to the evidence of purported

heirs to determine if such heirs are eligible distributees. The validity of foreign acts does not enter the case.

The heirs also urge here that ORS 111.070 (App., *infra*, p. 24) is violative of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution (App., *infra*, p. 25). However, these issues have never been raised before or decided by any other court in this case and they are therefore not properly before this Court. In addition, the heirs as nonresident aliens do not come under the constitutional protections as they are outside the territorial jurisdiction of the United States.

The State of Oregon takes the position that a consideration of the 1923 Treaty and its application to East Germany must involve the events, negotiations and agreements leading to the 1954 Treaty and specifically Article XXVIII thereof (App., *infra*, pp. 30-31).

From this material it is a logical conclusion that the 1954 Treaty abrogated a large portion of the 1923 Treaty and limited the application of the remainder to the territory under the jurisdiction of the Federal Republic of Germany. Therefore the 1923 Treaty is not applicable to East Germany, especially Article IV of the 1923 Treaty, as it no longer exists.

ARGUMENT

1. The provisions and requirements of Section 111.070 of Oregon Revised Statutes are not an unconstitutional incursion of the state into the Federal Government's exclusive field of foreign affairs.

The relevant requirements of ORS 111.070, (App., *infra*, p. 24) briefly stated, are three; (1)(a) the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country; (1)(b) that United States citizens be able to receive payment in the United States of funds from estates in the foreign country; and (1)(c) that the nonresident alien beneficiary of an Oregon estate be able to receive the assets of the estate without confiscation.

The State of Oregon contends that the requirements of ORS 111.070 are proper regulation of the devolution or succession of the property within the state of a decedent domiciliary under the powers reserved to the states by the Tenth Amendment of the United States Constitution.

As this Court has consistently held from the case of *Mager v. Grima* (U.S.) 8 How. 490, 493-494, in 1850, through the cases of *Lyeth v. Hoey*, 305 U.S. 188, 193; *Irving Trust Co. v. Day*, 314 U.S. 556, 562; and *Clark v. Allen*, 331 U.S. 503, 517, to the case of *United States v. Burnison*, 339 U.S. 87, 91-93, in 1949, the rights, requirements, conditions and limitations upon the succession to property are determined by the law of the state within the limits of which the property is situated.

The Court in *United States v. Burnison*, 339 U.S. 87, 91, restated its holding in *United States v. Fox*, 94 U.S. 315, 321,

"* * * that the power to control devises of property was in the State, and that therefore a person

must 'devise his lands in that State within the limitations of the statute or he cannot devise them at all.'"

The Court in *Burnison*, supra, (339 U.S. at 91), approached the problem there, whether the state statute could preclude a devise to the United States, in a manner that appears applicable to the present case.

"* * * This argument (that the state cannot interfere with the right of the U.S. to receive) fails to recognize that the state acts upon the power of its domiciliary to give and not on the United States power to receive. * * *"

The Court further underlined this position and reinforced it a few lines later in the *Burnison* case, supra, (339 U.S. at 91-92), when it said,

"* * * The *Fox* case is only one of a long line of cases which have consistently held that part of the residue of sovereignty retained by the states, a residue insured by the Tenth Amendment, is the power to determine the manner of testamentary transfer of a domiciliary's property and the power to determine who may be made beneficiaries. * * *"

This is not to imply that the power of the states over succession to decedents' estates is absolute. The State of Oregon and the Oregon Supreme Court (R. 27-28) recognize that state statutes are subordinate to applicable contrary treaty provisions, or to "an overriding federal policy, as where a treaty makes different or conflicting arrangements." *Clark v. Allen*, 331 U.S. 503, 517, citing *Hauenstein v. Lynham*, 100 U.S. 483, and Cf. *Hines v. Davidowitz*, 312 U.S. 52.

However, the fact that state regulation of decedents' estates may effect the periphery of the federal right to

regulate foreign relations is no more an interference with this federal power than the fact that state action may affect certain areas of interstate commerce. See *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 How. 299, 318, 319.

If this Court decides to continue interpreting Article IV of the 1923 Treaty (App., *infra*, p. 26) as applicable to East Germany, but only as pertaining to real property, or if the Court determines that the 1923 Treaty has been terminated, as is hereafter submitted, and is not applicable to East Germany, then the question posed is, does any "overriding federal policy" exist before which the law of the State of Oregon must give way?

The heirs contend that the statute has a profound effect on foreign affairs and relations. However, there is no demonstration of such effect, other than the statements of the heirs with reference to the many cases cited that, "reflections by state courts * * * must inevitably embarrass the executive branch and have an adverse effect on the relations of the United States * * * cannot be denied and needs no demonstration." (Appellants' Br. p. 27) or "* * * no one could argue with any conviction that a case such as this does not seriously affect the foreign relations of the United States." (Appellants' Br. p. 34).

The State of Oregon denies the adverse effect of such laws on the foreign relations of the United States. We submit that such allegations do need demonstration and we feel the lack of serious affect can be argued.

We would not and do not contend that such laws may

not have some indirect effect on foreign affairs, as this court observed in *Clark v. Allen*, 331 U.S. 503, 517,

" * * * What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line."

To this point, the only statements known to the State of Oregon from any government relating to the effect of the statute in question, ORS 111.070 on foreign relations or affairs is the statement of the Federal Government through the Solicitor General in his Memorandum Brief, p. 5, filed herein upon the Order of the Court, wherein it was stated,

" * * * The Department of State has advised us, however, that State reciprocity laws, including that of Oregon, have had little effect on the foreign relations and policy of this country, * * * Appellants' apprehension of a deterioration in international relations, unsubstantiated by experience, does not constitute the kind of 'changed conditions' which might call for a re-examination of *Clark v. Allen*."

With this position taken by the U. S. State Department it appears plain that the argument of the heirs is one of desperation rather than actuality."

While the laws of the State of Oregon must bow to an "overriding federal policy" if any federal policy can be said to exist in this area it must be interpreted to be that the Federal Government looks upon the establishment and interpretation of laws of succession or devolution of property of decedents as being specifically within the province of the several states unless specific provi-

sion is made therefore by international agreement or treaty.

2. The "Act of State" doctrine is not applicable to the case of state determination and regulation of succession to or devolution of the property of domiciliary decedents.

The "Act of State" doctrine as carried forward by the case of *Banco National De Cuba v. Sabbatino*, 376 U.S. 398 cannot be used as the basis for holding that the courts of the states may not examine the laws of foreign states relative to the inquiry of whether there is an eligible beneficiary to the estate of a domiciliary decedent.

The specific holding of the *Sabbatino* case at 376 U.S. 428, as stated by Mr. Justice Harlan, was,

"* * * we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law."

There are at least two distinctions or requisites of the "Act of State" doctrine which preclude any application to the present case.

First, the doctrine only applies to a sovereign government recognized by the United States.

Recognition of the foreign government is a substantial element of the doctrine as evidenced by the distinction drawn in *Sabbatino* between nonrecognition and severance of relations with a recognized government.

Sabbatino, *supra*, 376 U.S. 410. There can be no question here that with the heirs as residents of East Germany, over which the recognized Government of the Federal Republic of Germany has no territorial jurisdiction, (Agreement of 1953, App. *infra*, pp. 28-29; Article XXVI 1954 Treaty, App. *infra*, p. 30), the requirement of recognition is a high hurdle.

Second, and more importantly, the "Act of State" doctrine only precludes the courts from examining the *validity* of the internal acts of a sovereign foreign power. Here the validity of the acts of the foreign sovereign is not in question. Under the reciprocal inheritance statutes the courts do not inquire into the validity of the foreign acts but only into their existence as it relates to the establishment of a claimant as an eligible heir of the domiciliary decedent under the laws of the state.

As stated earlier in our argument the regulation and requirements for the inheritance of property within a state from its domiciliary decedents is a matter of state law. *Mager v. Grima*, (U.S.) 8 How. 490; *Clark v. Allen*, 331 U.S. 503, and *United States v. Burnison*, 339 U.S. 87, and other cases previously cited.

Further, the "Act of State" doctrine is usually a matter for consideration in cases of an uncompensated taking or other similar act by a foreign power. We submit that the doctrine is not applicable to this case, even by analogy.

The heirs, presumably as a make-weight argument, (Appellants' Br. 64), seek to impute to the State of Oregon in its enactment of ORS 111.070 in 1951 (Oregon

Laws 1951, chapter 519) the intent expressed by the California legislature (Cal. Stat. 1941, ch. 895; Appellants' Br. 38-39) in the required emergency clause explanation for the California reciprocity statute.

The clause provided briefly that because of the effect of the war, property due California citizens or owned by them was impounded or confiscated by foreign nations, and such foreign nations constitute a threat to the United States Government and therefore it is necessary that property of United States decedents remain in the United States rather than being transmitted to foreign nations where it might be used in war against the United States.

Not only did the California District Court of Appeal, First District, deny that this statement was a valid exposition of legislative intent in *Bevilacqua's Estate*, (no official citation found), 161 P. 2d 589, 594 (1945), but the very language of the statement, relating, in 1941 to World War II is irrelevant in 1951, when ORS 111.070 was enacted.

3. The contention of the heirs that Section 111.070 of Oregon Revised Statutes is repugnant to the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States is not properly before this court nor do the heirs as nonresident aliens have standing to avail themselves of this constitutional protection.

In this case as in *Clark v. Allen*, 331 U.S. 503, 516, "Issues under the Fourteenth Amendment are not raised * * *." The heirs seek to inject these issues into the

case for the first time in their presentation to this Court, without ever having raised the issue in the courts of Oregon.

In an "unbroken line of precedent" this Court has held that where the issue has not been presented to the state courts and has not in fact been decided by the highest court of the state, the question will not be entertained. *Beck v. Washington*, 369 U.S. 541; *Wolfe v. North Carolina*, 364 U.S. 177, 195; *John v. Paullin et al.*, 231 U.S. 583.

Even beyond this, assuming *arguendo* that the matter might be heard, the heirs have no standing to raise the issue.

The protections of the Constitution of the United States do not extend to aliens not within the territorial jurisdiction of the United States. As the Court stated in *Johnson v. Eisentrager*, 339 U.S. 763, 771.

"But in extending constitutional protections beyond the citizenry, the court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act. In the pioneer case of *Yick Wo v Hopkins*, the Court said of the Fourteenth Amendment,

"These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; . . ."

For these reasons, the issue of whether ORS 111.070 contravenes the due process clause or equal protection clause of the Fourteenth Amendment to the Constitution of the United States is not before the Court.

4. A substantial part of the 1923 Treaty of Friend-

ship, Commerce and Consular Rights between the United States and Germany including Article IV has been expressly terminated.

(Note: This point of argument has been included in response to the position taken by the Solicitor General of the United States in his brief as amicus curiae, on file herein. The Solicitor General advocates the re-interpretation of the 1923 Treaty to hold that Article IV thereof applies to the dévolution of personal property as well as real property in the United States to heirs in East Germany. The State of Oregon submits that in a re-evaluation of the 1923 Treaty there are facts sufficient, which have occurred since the decision of *Clark v. Allen*, 331 U.S. 503, upon which to decide that Article I through XVI of the 1923 Treaty have been terminated, and that by express limitation of the remaining provisions they are only applicable to the territorial jurisdiction of the Federal Republic of Germany.)

The State of Oregon takes the position that the Treaty of Friendship, Commerce and Consular Rights between the United States and Germany, December 8, 1923, 44 Stat. 2132, T.S. No. 725 (effective October 14, 1925) amended June 3, 1935, 49 Stat. 3258, T.S. No. 897, hereinafter called the 1923 Treaty, has been substantially terminated or abrogated by the Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, October 29, 1954, 7 U.S.T. & O.I.A. 1839, TIAS No. 3593 (effective July 14, 1956) hereafter called the 1954 Treaty.

The Supreme Court of Oregon in considering this

case concluded that due to the limitation of the 1954 Treaty to the territory under the sovereignty of the Federal Republic of Germany the language of Article XXVIII of the 1954 Treaty did not apply to the 1923 Treaty as a whole (R. 20).

Article XXXI of the 1923 Treaty (App., *infra*, p. 27) provides for the modification or termination of the Treaty after the initial ten year period of the Treaty, one year after notification by either party of the intention to modify or terminate the Treaty. The events deemed relevant to this issue are set forth below.

Article VII of the 1923 Treaty was amended by Agreement between the United States of America and Germany dated June 3, 1935, 49 Stat. 3258, T.S. No. 897, whereby the second, third, fourth, sixth and seventh paragraphs of Article VII were abrogated. This act was between the original treaty parties.

Eighteen years later the 1923 Treaty as amended was modified by an exchange of notes dated June 2, 1953 between the Secretary of State of the United States and the Charge d'Affaires of the Federal Republic of Germany, 5 U.S.T. & O.I.A. 827, TIAS No. 2972. (App., *infra*, pp. 27-28), hereafter called the notes of June 2, 1953. The modification consisted of the termination of Article VI of the Treaty of 1923 under the provisions of Article XXXI thereof. (App., *infra*, p. 27)

The next day, June 3, 1953, an Agreement between the United States of America and the Federal Republic of Germany, 5 U.S.T. & O.I.A. 1939, TIAS No. 3062 was signed concerning the application of the 1923 Treaty,

hereafter called the Agreement of 1953. The relevant portions of this June 3, 1953 agreement for our purposes are the preamble of the agreement, Article IV and Article V (App., *infra*, pp. 28-29).

Briefly, the preamble (App., *infra*, p. 28) states the intent of the parties is the restoration of the 1923 Treaty to full force and effect except as provided, as a provisional measure pending conclusion of a new treaty.

Article IV (App., *infra*, p. 29) provides in essence that until Germany is unified the 1923 Treaty shall be applied to all of the territory over which the Federal Republic of Germany exercises jurisdiction. Further, the 1923 Treaty should also be applied to West Berlin when the necessary legal procedures had been accomplished.

Article V (App., *infra*, p. 29) agrees that negotiations for a new treaty shall begin immediately.

Finally, the 1954 Treaty was negotiated. Article XXVIII (App., *infra*, pp. 30-31) of the 1954 Treaty expressly terminates Articles I through V, VII through XVI, and XXIX through XXXII of the 1923 Treaty. Thus, considering Article VI already having been terminated by the notes of June 2, 1953, (App., *infra*, pp. 27-28), only Articles XVII through XXVIII remain in force until replaced by a consular convention between the Treaty parties.

The conclusion to be drawn from the negotiations and agreements set forth is that from the time of the notes of June 2, 1953 modifying the 1923 Treaty, the United States dealt with the Federal Republic of Germany as the Treaty Party under the 1923 Treaty. Thus when the

Treaty was restored to full force but limited by the Treaty parties to the territorial jurisdiction of the Federal Republic of Germany this was the limit of the existence of the Treaty. Then by Article XXVIII of the 1954 Treaty the Treaty Parties terminated Articles I through XVI of the 1923 Treaty. The logical result of this action by the Parties is that these Articles no longer exist for any purpose, having been expressly abrogated by the parties. The portion remaining in existence, Articles XVII through XXVIII, are limited in application to the Federal Republic of Germany.

Further evidence of the attitude of the United States toward the status of the Federal Republic of Germany is available from statements issued by the governments of both the United States of America and the Federal Republic of Germany, as compiled in I Whiteman, Digest of International Law 332-338 (1963). At page 332 the editor states,

"In consideration of the question whether the Government of the Federal Republic may be regarded as the successor of the German Reich, the Office of the Legal Advisor prepared a memorandum in 1950 which, in discussing first the issue of Germany's continued existence as a State, reads in part as follows:

" 'Since limited sovereignty is no bar to the existence of a State, we may proceed to examine the case of Germany in the light of the usual requisites of statehood. * * * The requisites for a State were present and never ceased to exist.

* * *

" ' . . . The Government of the Federal Republic may be considered as the Government of Germany.

* * *

"The position of the Three Powers is that the government of the Federal Republic is the one and only legitimate government qualified to speak for the German people. The existence of the eastern German government is not recognized as legitimate. Therefore, the situation is as if it did not exist. . . ."

"The Office of the Legal Advisor (Raymond), memorandum, 'Memorandum on the Successorship of the Government of the Federal Republic to the Reich', July 13, 1950, MS. Department of State, file 762.00/7-1350."

Thus, it is apparent that in 1950 the United States State Department considered that the Federal Republic of Germany spoke as the Government of Germany.

The advent of the Soviet Government's position that East Germany had become a sovereign state was the occasion for additional statements which are of interest. These are set forth in 1 Whiteman, Digest of International Law 337-338 (1963), as follows:

"In response to the Soviet Government's announcement of March 25, 1954, that East Germany had become a sovereign state, the United States, British, and French High Commissioners issued a joint declaration April 8, 1954, which read:

* * *

"The three governments represented in the Allied High Commission will continue to regard the Soviet Union as the responsible power for the Soviet Zone of Germany. These governments do not recognize the sovereignty of the East German regime which is not based on free elections, and do not intend to deal with it as a government. . . ."

"XXX Bulletin, Department of State, No. 773, Apr. 19, 1954, p. 588; II American Foreign Policy, 1950-1955: Basic Documents (1957) 1756-1757.

"Adverting to the Soviet Union Government's

announcement of March 25, 1954, regarding the establishment of the same relations with the so-called German Democratic Republic as with other sovereign states, the Government of the German Federal Republic declared in a statement of April 7, 1954:

"By this declaration the Soviet Government seeks to create the impression that the part of Germany occupied by it has become an independent state with status equal to that of other sovereign states.

"The Soviet declaration cannot, however, alter in any way the fact that there is, was, and will be only one German state, and that it is solely the governmental organs of the Federal Republic of Germany which today represents this German state which has never perished. Nor is this fact altered by the painful reality which is that German sovereignty cannot at present be exercised uniformly in all parts of Germany."

"II Bundestag Stenografische Berichte (1954) 794."

The limitation of the territorial sovereignty of the Federal Republic of Germany either by the Agreement of 1953 or the 1954 Treaty does not operate to preclude the United States from terminating the 1923 Treaty or any portion of it for such action may be accomplished, under the terms of the Treaty, Article XXXI (App., infra, p. 27) by unilateral notice by either of the parties.

The Supreme Court of Oregon came to the conclusion that the 1923 Treaty was in existence and applicable to East Germany (R. 27). We would submit that this conclusion should be re-examined, not upon the basis of the possible abrogation of the 1923 Treaty by virtue of World War II or the ability of compliance or enforcement of the treaty obligations, although the latter matters

certainly raise questions, but we question the conclusion based upon the acts of the Treaty Parties as set out above.

The Supreme Court of Oregon relied to some extent upon two statements of the State Department of the United States to the effect that the provisions in Article XXVIII of the 1954 Treaty (App., supra, pp. 30-31) terminating the majority of the 1923 Treaty did not effect the termination of the 1923 Treaty as applied to East Germany.

The first of the two statements (R. 20) is found in a letter dated February 24, 1964, from Ely Maurer, Assistant Legal Adviser for European affairs, to Attorney General of Oregon Robert Y. Thornton, it stated,

"* * * Since the Federal Republic of Germany was the Party to the 1954 Treaty the provisions of that Treaty apply solely with regard to the area of the Federal (fol.20) Republic of Germany. Consequently, the 1954 Treaty does not apply with respect to that part of Germany outside the Federal Republic of Germany commonly referred to as East Germany, and Article XXVIII of the 1954 Treaty does not apply with regard to East Germany. As far as East Germany is concerned, Article IV of the 1923 Treaty has not been replaced through the operation of Article XXVIII of the 1954 Treaty."

The second statement (R.24-25) appears in a document published by the Treaty Affairs Staff, Office of the Legal Adviser, United States State Department dated September 30, 1965, "Treaty Provisions Relating to the Rights of Inheritance and Acquisition and Ownership of Property in Force between the United States and Other Countries", at page 19-20, Note 3, and states in part,

"* * * It appears that Article IV of the treaty

of friendship, commerce, and consular rights between the United States and Germany signed on December 8, 1923 (44 Stat. 2132), which contains provisions relating to rights of inheritance of and succession to property, continues in force with respect to areas of Germany not presently included in the territory of the Federal Republic and Land Berlin. The entry into force of the 1954 treaty between the United States and the Federal Republic, which replaced and terminated Article IV of the 1923 treaty with respect to the area of Germany constituting the Federal Republic and Land Berlin, had no effect on the 1923 Treaty with respect to the area of Germany not included in the Federal Republic and Land Berlin. The United States considers that the Soviet Union remains responsible for the Soviet Zone of Germany. The Soviet Union has purported to turn control of the Soviet Zone over to the so-called German Democratic Republic and has denied further responsibility for governmental activities in that area. The United States does not recognize the Soviet Zone as a separate State and does not recognize the present regime there as a government. The United States considers that the Government of the Federal Republic of Germany is the only government entitled to speak on behalf of the German people."

While these statements are entitled to and were given weight by the Oregon Supreme Court (R. 25) and their value is acknowledged by the State of Oregon they are not solely determinative. Nor is this Court bound by the interpretation of the treaty provisions by the governmental departments charged with their negotiation and enforcement. *Kolovrat v. Oregon*, 366 U.S. 187, 194.

For these reasons the State of Oregon submits that an examination of the modification of the 1923 Treaty and the background and environment of the 1954 Treaty

leads to the conclusion that the 1923 Treaty was substantially terminated and by its subsequent limitation to the territorial jurisdiction of the Federal Republic of Germany is not applicable to East Germany.

CONCLUSION

For the reasons above stated the State of Oregon submits that the decision of the Supreme Court of Oregon should be affirmed unless the Court should conclude as contended by the State of Oregon, that the 1923 Treaty was terminated by the execution of the 1954 Treaty. In that event the decision of the Oregon Supreme Court should be modified to the extent that the order of distribution of the real property to the heirs should be reversed and the real property should be included in the escheat to the State of Oregon.

Respectfully submitted.

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APPENDIX**STATUTES, NOTES, AGREEMENTS AND TREATIES INVOLVED**

1. Section 111.070 of the Oregon Revised Statutes provides as follows:

"(1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:

"(a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such alien is an inhabitant or citizen;

"(b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and

"(c) Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.

"(2) The burden is upon such nonresident alien to establish the fact of existence of the reciprocal rights set forth in subsection (1) of this section.

"(3) If such reciprocal rights are not found to exist and if no heir, devisee or legatee other than such alien is found eligible to take such property, the property shall be disposed of as escheated property."

2. The portions of the Constitution of the United States and the Amendments thereto relevant to the present case are as follows:

From Article I, Section 8, headed "Powers of Congress," the clauses providing,

"To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

From Article I, Section 10, headed "Limitations upon powers of state.", the clauses providing,

"No State shall enter into any Treaty, Alliance, or Confederation; * * *"

"No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State, or with a foreign Power, * * *"

From the Fourteenth Amendment, Section 1, headed "Citizenship, privileges and immunities; due process; equal protection.", the clause providing,

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(The excerpts of the Constitution of the United States and Amendments are set forth as published in Vol. 5, Oregon Revised Statutes, pp. 1139-1140, 1141, 1145-1146.)

3. Articles IV and XXXI of the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany, signed December 8, 1923, proclaimed October 14, 1925, 44 Stat. 2132, 2157, T.S. No. 725, provide as follows:

ARTICLE IV

"Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

"Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases."

ARTICLE XXXI

"The present treaty shall remain in full force for the term of ten years from the date of the exchange of ratifications, on which date it shall begin to take effect in all of its provisions.

"If within one year before the expiration of the aforesaid period of ten years neither High Contracting Party notifies to the other an intention of modifying, by change or omission, any of the provisions of any of the articles in this Treaty or of terminating it upon the expiration of the aforesaid period, the Treaty shall remain in full force and effect after the aforesaid period and until one year from such a time as either of the High Contracting Parties shall have notified to the other an intention of modifying or terminating the Treaty."

4. Notes dated June 2, 1953 between Secretary of State of the United States and the Charge d' Affaires of the Federal Republic of Germany effecting an agreement between United States of America and the Federal Republic of Germany modifying the Treaty of December 8, 1923, as amended, 5 U.S.T. & O.I.A. 827, 828, 829, T.I.A.S. No. 29732, provide as follows:

"The Secretary of State to the Charge d'Affaires of
the Federal Republic of Germany

June 2 1953

Sir:

"I refer to various discussions which have taken place concerning the liability of German nationals to compulsory service in the armed forces of the United States, and to the problem presented to this Government in carrying out the provisions of Article VI of the Treaty of Friendship, Commerce and Consular Rights signed at Washington on December 8, 1923,

in the light of the Universal Military Training and Service Act of 1951. [2] The Act provides that aliens admitted to the United States for permanent residence shall be subject to induction on the same terms as United States citizens.

"In view of this situation, I wish to inform you of the desire of this Government to modify the said Treaty as provided in Article XXXI thereof, by omitting the said Article VI, and I herewith request you to notify your Government that, beginning one year from the date of this note, the Government of the United States will consider the said Article VI to be no longer an operative part of the said Treaty of 1923.

"Accept, Sir, the renewed assurances of my high consideration."

"The Charge d'Affaires of the Federal Republic of Germany to the Secretary of State

June 2, 1953

"Excellency:

I have the honor to acknowledge the receipt of your Excellency's note, dated June 2, 1953, by which the American Government serves notice of its desire to modify the Treaty of Friendship, Commerce, and Consular Rights signed at Washington, December 8, 1923, by omitting Article VI of the Treaty in accordance with the provisions contained in Article XXXI thereof.

Accept, Excellency, the renewed assurances of my highest consideration."

5. The preamble and Articles IV and V of the Agreement concerning the Treaty between the United States of America and Germany of Friendship, Commerce and

Consular Rights of December 8, 1923, as amended, signed June 3, 1953, effective October 22, 1954, 5 U.S.T. & O.I.A. 1939, 1941, 1943, 1944, TIAS No. 3593, provide as follows:

"The United States of America and the Federal Republic of Germany, desirous of strengthening the bonds of friendship existing between them and of placing their relations on a normal and stable basis as soon as possible, have resolved as a step toward that end to restore to full force and effect, except as otherwise provided in the following Articles, the provisions of the Treaty of Friendship, Commerce and Consular Rights between the United States of America and Germany signed at Washington December 8, 1923, as amended, as a provisional measure pending the conclusion of a more comprehensive, modern treaty or treaties for such purposes, and have, through their duly authorized representatives, agreed as follows:"

ARTICLE IV

"Pending the peaceful reunification of Germany, the German territory to which the aforesaid Treaty shall be applied and considered fully operative shall be understood to comprise all areas of land, water and air over which the Federal Republic of Germany exercises jurisdiction. The present agreement shall also enter into force, and the aforesaid Treaty shall be applied and considered fully operative, in the area of Berlin (West) when the Government of the Federal Republic of Germany furnishes the Government of the United States of America a notification that all legal procedures in Berlin necessary therefor have been complied with."

ARTICLE V

"It is agreed that negotiations for a new Treaty of Friendship, Commerce and Navigation shall be entered into without delay."

6. Articles XXVI and XXVIII of the Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, signed October 29, 1954, effective July 14, 1956, 7 U.S.T. & O.I.A. 1839, 1868, TIAS No. 3593, provide as follows:

ARTICLE XXVI

"1. The territories to which the present Treaty extends shall comprise all areas of land and water under the sovereignty or authority of each Party, other than the Panama Canal Zone and the Trust Territory of the Pacific Islands.

"2. The present Treaty shall also apply from the date specified in Article XXIX, paragraph 2, to Land Berlin which for the purposes of the present Treaty comprises those areas over which the Berlin Senate exercises jurisdiction.

"3. It is a condition to the application of the present Treaty to Land Berlin, in accordance with the preceding paragraph, that the Government of the Federal Republic of Germany shall previously have furnished to the Government of the United States of America a notification that all legal procedures in Berlin necessary for the application of the present Treaty therein have been complied with.

ARTICLE XXVIII

"The present Treaty shall replace and terminate provisions in force in Articles I through V, VII through XVI, and XXIX through XXXII, of the treaty of friendship, commerce and consular rights between the United States of America and Germany, signed at Washington December 8, 1923, as amended by an exchange of notes dated March 19 and May 21, 1925 and the agreement signed at Washington June 3, 1935, and as applied by the agreement of June 3, 1953, Article VI having terminated on June 2, 1954: Articles XVII through XXVIII of the said treaty, as

amended by Article II of the agreement of June 3, 1953, shall continue in force between the United States of America and the Federal Republic of Germany, with territorial application to the same extent as that provided in Article XXVI of the present Treaty, until replaced by a consular convention between the two Parties or until six months after either Party shall have given to the other Party a written notice of termination of the said Articles."

OCT 16 1967

JOHN F. DAVIS, CLERK

**In the Supreme Court
of the United States**

OCTOBER TERM 1967

No. 21

**In the Matter of the Estate of
PAULINE SCHRADER, Deceased**

**OSWALD ZSCHERNIG, MINNA PABEL, OLGA HERTA
WINCKLER, ALFRED KOESTER, JOHANNA BLASCHKE
and HANS FUESSEL,**

Appellants,

v.

**WILLIAM J. MILLER, Administrator of the Estate of
Pauline Schrader, Deceased, MARK O. HATFIELD,
TOM McCALL and ROBERT W. STRAUB, respectively
the Governor, Secretary of State and State Treasurer
of Oregon, constituting the STATE LAND BOARD OF
OREGON, and all persons unnamed or unknown having
or claiming any interest in the Estate of
Pauline Schrader, Deceased,**

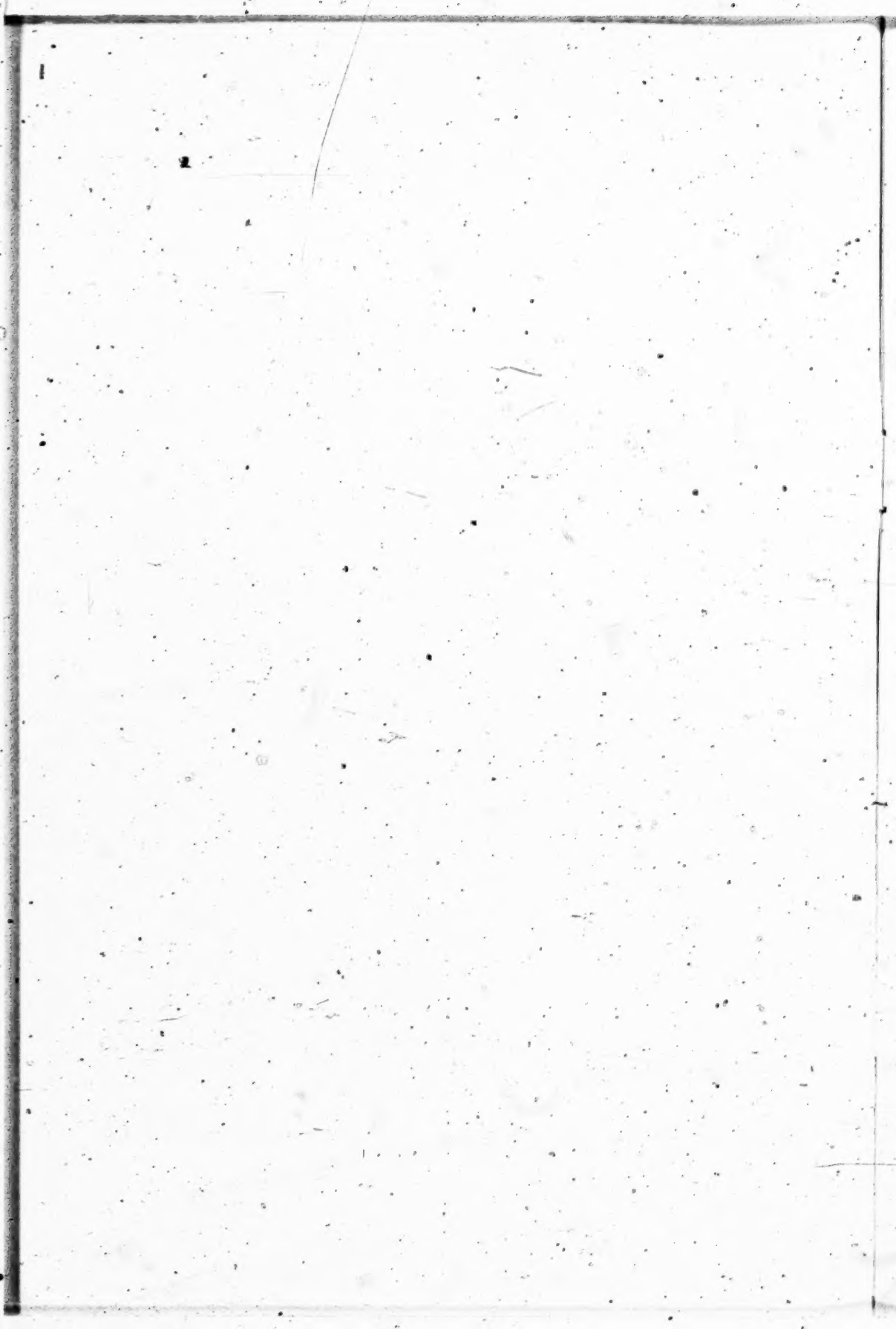
Appellees.

Appeal from the Supreme Court of the State of Oregon

APPELLANTS' REPLY BRIEF

**[in response to Brief of Appellee State Land Board
of Oregon, and
Brief for the United States as Amicus Curiae]**

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In the Supreme Court of the United States

OCTOBER TERM 1967

No. 21

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the Governor, Secretary of State and State Treasurer
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OREGON, and all persons unnamed or unknown having
or claiming any interest in the Estate of
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Appellees.

Appeal from the Supreme Court of the State of Oregon

APPELLANTS' REPLY BRIEF

I. In Response to Brief of Appellee State Land Board of Oregon

Introduction

The Brief of Appellee State Land Board of Oregon, filed herein by the Attorney General of Oregon,

makes and presents argument on four points briefly summarized as follows:

1. That ORS 111.070, Oregon's reciprocal inheritance rights statute, is not an unconstitutional incursion by the state into the Federal Government's exclusive field of foreign affairs.

2. That the "Act of State" doctrine [most recently declared by this Court in *Sabbatino*, 376 U.S. 398] is not applicable to the issues of this case.

3. That the due process and equal protection clauses of the Fourteenth Amendment are not properly before this Court and that the non-resident alien heirs may not therefore claim any rights thereunder, and

4. That a substantial part of the 1923 treaty with Germany, including particularly Article IV relating to inheritance rights, has been expressly terminated, that therefore the ruling of the Oregon Supreme Court that the heirs were entitled to inherit the real (but not the personal) property of the estate was erroneous and that in fact the entire estate, real and personal, should have been escheated to the State of Oregon.

Most of the appellee's arguments under points 1 and 2 were anticipated in the Brief of Appellants and there is therefore no need for extensive reply thereto. Point 3 was heretofore answered in an earlier brief filed herein. Point 4 requires no reply because it is not before the Court in this appeal.

Point 1

ORS 111.070, the reciprocal inheritance rights statute, as construed and applied by the Oregon courts, is in fact a flagrant, unconstitutional incursion into the exclusive federal field of regulating the foreign affairs of the United States.

Appellee argues at length that the regulation of decedents' estates is traditionally a state rather than a federal function, citing *United States v. Burnison*, 339 U.S. 87 (1949) and earlier cases. *Burnison* had nothing to do with matters foreign, holding only that the Federal Government was not eligible to take by will under an applicable California statute. However, Appellee recognizes that this state power is not absolute, (Br. 8), that state statutes are subordinate to treaties or other indicia of overriding federal policy. But the premise goes farther than that. Such statutes also may not regulate in an area of international relations. As Mr. Justice Douglas put it in his dissent in *Ioannou v. New York*, 371 U.S. at 31:

"Thus, if New York has, in effect, regulated an area of our international relations that should be regulated only by the Federal Government, or if the New York statute conflicts with existing federal policy, then that statute cannot be given effect."

We have pointed out that the Oregon Supreme Court stated the legislative purpose of the present statute's much milder, less demanding predecessor, § 61-107, O.C.L.A., as follows:

"The purpose of § 61-107, O.C.L.A., is clear

beyond doubt. It was enacted to assure reciprocal rights of inheritance to American citizens and alien residents or citizens. It was, in a sense, an inducement to foreign nations to so frame the inheritance laws of their respective countries in a manner which would insure to Oregonians the same opportunities to inherit and take personal property abroad that they enjoy in the state of Oregon. In re Estate of Krachler, supra (199 Or. at page 457)."

(Clostermann v. Schmidt, 215 Or. at 68)

This was in fact tantamount to the State of Oregon saying to foreign nations that if they do not conform their inheritance laws to Oregon's, their nationals would not be permitted to inherit in Oregon. On page 38 of appellants' brief is quoted the emergency clause to California's first reciprocity statute [Cal. Stats. 1941, ch. 895] which with amazing frankness stated the purpose of that statute to be to keep California inheritance funds from foreign nations who might use them "for the purposes of waging war that eventually may be directed against the Government of the United States." In essence, in fact almost verbally, most of Oregon's present § 111.070, enacted in 1951, here assailed, is the same as California's first reciprocity statute. Having thus in effect copied California's statute, it is, we submit, in order to ascribe the same legislative intent and purpose thereto. Clearly these are the concerns of the federal government acting for the nation as a whole, not of any individual state. They are not statutes "justified by any legitimate state

interest in regulating the local aspects of inheritance." Again quoting from *Ioannou* (371 U.S. at 34):

"If New York's purpose is to preclude friendly governments from obtaining funds that will assist their efforts hostile to the Nation's interests, as *In re Getream's Estate*, 200 Misc. 543, 107 N.Y.S.2d 225, and *In re Renard's Estate*, 179 Misc. 885, 39 N.Y.S.2d 968, suggest, the complete prohibition of assignments made in those countries may have some basis in reason. But, if this is the purpose behind the statute, it seemingly is an attempt to regulate foreign affairs."

Appellee points at page 10 to the statement in the Solicitor General's Memorandum Brief (p. 5) that the State Department has advised "that State reciprocity laws, including that of Oregon, have had little effect on the foreign relations and policy of this country," and charge (at p. 9) that appellants have not demonstrated that the Oregon statute, and such reciprocity statutes generally, have had adverse effects on the foreign relations of the United States. True, there are not in this record the reactions of the men who sit in the consulates, in the embassies, in the foreign ministries, in the justice ministries, in the highest councils of the nations whose nationals' inheritances have been taken away, often confiscated, by American states, whose governments have been reviled, their officials maligned by American courts. It would, however, be denying the obvious, the self-evident, the undeniable, to contend that the reciproc-

ity statutes and the court decisions thereunder, some of which are reviewed on pages 18 to 53 of appellants' brief, have not had an adverse effect on the relations between the United States and the affected countries. It would be tantamount to contending that a man whose property has been forcibly taken from him, whose character has been sullied, whose integrity has been assailed, does not resent it, does not yearn for revenge, does not plan for retaliation when the opportunity offers.

If the State Department has as yet seen no more than "little effect" of the reciprocity laws on the foreign relations and policy of this country, this by no means negates our contentions. As shown on pages 14 and 55 of appellants' brief, there are as yet only about eleven states with reciprocity statutes, not all of those have the confiscatory provisions of Oregon's § 111.070, in only a few (primarily California and Montana) are the statutes so zealously invoked and enforced. However if Oregon's statute, the most demanding and drastic of them all, were given the stamp of constitutional validity by this Court, if it were in effect held that each of the fifty states of this union may lay down its own terms, conditions and demands upon foreign nations as the price for permitting their nationals to inherit, it is a certainty that there will ensue a great proliferation of such statutes, and their ever more zealous enforcement. Then retaliation from abroad will follow as the night the day.

Point 2.

The "Act of State" doctrine is indeed by analogy applicable to the issues of this case.

Appellee's statement of his point 2 fails to include the most important element. It appears on page 11 of his brief as follows:

"2. The 'Act of State' doctrine is not applicable to the case of state determination and regulation of succession to or devolution of the property of domiciliary decedents."

In itself this statement is innocuous, perhaps not incorrect as far as it goes, but not pertinent to this case. To make it pertinent there would have to be added the words "to non-resident alien heirs or testamentary beneficiaries," whereupon the statement immediately becomes incorrect. As extensively demonstrated in appellants' brief, for an Oregon court to determine if a given foreign country (absent a treaty) meets each, and all, of the three requirements to make its nationals eligible to inherit in Oregon, it must examine, sit in judgment on, and then either recognize as adequate or reject as inadequate that country's constitution, laws, regulations, and decisions of its courts, the decisions and acts of its administrative agencies, *always as of the date, in fact the exact moment of the estate leaver's death*, in the following fields:

1. Of inheritance, to determine if American citizens have the right to inherit in the country

on the same terms and conditions as its own inhabitants and citizens.

2. Of foreign funds control and international remittance practices, to determine if an American citizen has the right to receive, i.e., to have remitted to him in the United States immediately and unrestrictedly, his inheritance from the country.

3. Of what happens, or would happen, to the foreign heir's inheritance money from an Oregon estate when it is remitted to him, to determine if the heir receives the "benefit, use or control" of it [whatever that may mean], and further determine if the foreign government is going to "confiscate" it, or any part of it, the Oregon court to adjudge if whatever happens to the money constitutes, in its eyes, "confiscation in whole or in part," by the government of the country.

Parenthetically it may be mentioned that the Oregon Supreme Court solved this latter problem very simply by holding, in *Pekarek's Estate*, 234 Or. 74 at 82, that the foreign country's inclusion in Treasury Department Circular No. 655 was "evidence that foreign beneficiaries would not receive their interests free from control amounting to, at least, a partial confiscation." [See. Br. of Appls. 33).

In some fourteen of the smaller of Oregon's thirty-six counties probate jurisdiction is still in the county courts, the judges of which need not be lawyers. In some twelve of the more populous counties

probate jurisdiction has in recent years been placed in the district courts which have limited jurisdiction, and in the rest in the circuit courts, which are courts of general jurisdiction. Perhaps even the county judges who are not lawyers could find the answers to these ramified and complex questions in respect to countries with well-organized governments and established jurisprudence, but what about countries, such as, for instance Saudi Arabia, South Korea, the newly emerging nations of Africa? It must be kept in mind that the statute places the burden of proof in respect to all three requirements upon the alien heir and if he fails to discharge the burden in any respect, perhaps through no fault of his, to the satisfaction of the probate judge, he loses his inheritance.

The point of all this is of course to show that by analogy the Act of State doctrine is applicable herein. Not only would the potential task of receiving evidence, examining and rendering decisions on the foreign law be overwhelming if not impossible, but there could not be any unanimity based on precedent because the law of any country could be different from day to day, even hour by hour or minute by minute. And only minor variations in the provisions or language of the reciprocity statutes from state to state would make even the decisions of the court of last resort in one state of little or no value in another state. Each decision would have its repercussion, good or bad, in the capital of the country involved, and would inevitably, persistently and perhaps not at all subtly, affect the relations between the United States and the country involved.

The courts of Oregon may not "sit in judgment" on the acts of another sovereign state, decide whether or not any particular act and each of a host of acts meets its approval, and, in the event of a negative conclusion, penalize an inhabitant or citizen of that country by disinherit him, perhaps seizing his inheritance for itself by escheat. Clearly and most emphatically, all this is in the federal domain as every decision under a reciprocal inheritance rights statute, and particularly under ORS 111.070, in some significant degree affects the foreign relations of the United States. As pointed out by this Court in *Sabbatino*, 376 U.S. at 416, quoting from *Underhill v. Hernandez*; 168 U.S. 250 at 252, redress of grievances by reason of acts of a foreign state against our citizens, such as depriving them of rights of inheritance "must be obtained through the means open to be availed of by sovereign powers as between themselves," that is the diplomatic channels maintained by the executive department of the federal government. If legislation is needed or desired, it must be on the federal level speaking for the country as a whole. Any matter affecting the foreign relations of the United States falls, as does the Act of State doctrine, within the field of the federal common law.

Point 3

The due process and equal protection clauses of the Fourteenth Amendment are properly before the Court.

As pointed out on page 2 of Appellants' Brief in Opposition to Motion to Dismiss or Affirm, if a state

statute be held invalid because in violation of Article I, § 10, Article I, § 8, Article VI or any other provision of the federal Constitution, it results therefrom that property escheated under such a statute is being taken by the state without due process of law or compensation. However, the point is of little importance, since it has been amply demonstrated that ORS 111-070 is an unconstitutional incursion by the state into the Federal Government's exclusive field of regulating the foreign affairs and relations of the United States.

Point 4

Whether a substantial part of the 1923 treaty with Germany, including particularly Article IV, has been terminated is not a question or issue in this appeal.

Nowhere in this appeal has this question been raised or heretofore mentioned. It is not among the questions set forth in the Notice of Appeal (R. 38-39), in the Jurisdictional Statement, in the Brief of Appellants or elsewhere. In fact at page 36 of the Brief of Appellants it is stated:

"The Oregon Supreme Court's ruling that the 1954 treaty has no territorial application to the Soviet Zone is not being appealed here, nor the ruling that the 1923 treaty continues to have territorial application to the Soviet Zone of Germany."

The State Land Board did not cross-appeal on this issue and appellants therefore deem it needless, in fact not in order, for them to comment thereon. It

might be mentioned that the State Department's declarations in regard to the continued effectiveness of the 1923 treaty in the Soviet Zone, on which the Oregon Supreme Court based its ruling that the heirs were entitled to inherit the real property, were introduced into the case by the appellee State Land Board of Oregon by its Exhibits 15 and 16, not by the plaintiffs-appellants.

II. In Response to the Brief for the United States as Amicus Curiae

Appellants disagree with the statement on page 4 of the Solicitor General's brief, at the outset of his "Introduction and Summary of Argument," that

"From the foregoing Statement, it is apparent that the disposition of this case will necessarily involve the interpretation of Article IV of the 1923 Treaty of Friendship, Commerce and Consular Rights."

It has already been shown by the above quotation from page 36 of the Brief of Appellants and otherwise that appellants did not appeal from the Oregon Supreme Court's rulings in respect to either the 1923 or the 1954 treaty. The Solicitor General appears determined to ask this Court to reconsider and reverse its interpretation of Article IV of the 1923 treaty in *Clark v. Allen* as it pertains to personal property and appends to his brief pages 39-67 of the government's brief in *Clark v. Allen*.

Here again, as in regard to Point 4 of the State Land Board's brief, appellants feel that they need not,

in fact that it would not be in order for them to respond to the Solicitor General's Brief for the United States as Amicus Curiae.

ADDITION TO BIBLIOGRAPHY

It was inadvertently omitted to include in the Bibliography on pages 68 and 69 of Brief of Appellants a Comment entitled "ESTATES: Soviet Citizens Can Inherit Under California Law—*Estate of Larkin*, (Cal. 1966)" [65 A.C. 49, 52 Cal. Rptr. 441, 416 P.2d 473] in the May 1967 California Law Review, Vol. 55, No. 2, p. 592. This is of particular interest because of the California Supreme Court's expressions of doubt on the constitutionality of the California reciprocity statute as quoted on pp. 44-46 of Brief of Appellants. Apparently this article was written prior to the California Supreme Court's decision for reciprocity with Rumania in *Chichernea's Estate*, 66 A.C. 74, 57 Cal. Rptr. 135, 424 P.2d 687, handed down March 8, 1967, in which the doubts of constitutionality of the statute were again expressed as quoted on p. 47 of Brief of Appellants. This is of course directly applicable to paragraph (1)(b), the second, "right to receive payment" requirement of ORS 111.070 which does indeed involve the "courts in matters of international monetary policy which may be within the exclusive province of federal authority" (57 Cal. Rptr. 150). Opposing counsel were advised by letter of this article and its omission from the bibliography at the time the Brief of Appellant was filed.

CONCLUSION.

Appellants reiterate their prayer that the decision of the Supreme Court of the State of Oregon be reversed, the Oregon reciprocity statute Section 111.070, Oregon Revised Statutes, declared repugnant to the cited provisions of the Constitution of the United States and therefore invalid and of no effect, and the heirs of Pauline Schrader held entitled to inherit the whole of her estate, real and personal.

October 12, 1967.

Respectfully submitted,

PETER A. SCHWABE, SR.

PETER A. SCHWABE, JR.

Attorneys for Appellants.

FEB 5 1968

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 21

In the Matter of the Estate of
PAULINE SCHRADER, Deceased

OSWALD ZSCHERNIG, MINNA PABEL, OLGA HERTA WINCKLER,
ALFRED KOESTER, JOHANNA BLASCHKE and HANS FUESSEL,
Appellants,

v.

WILLIAM J. MILLER, Administrator of the Estate of Pauline Schrader,
Deceased, MARK O. HATFIELD, TOM McCALL and ROBERT W.
STRAUB, respectively the Governor, Secretary of State and State
Treasurer of Oregon, constituting the STATE LAND BOARD OF
OREGON, and all persons unnamed or unknown having or claiming
any interest in the Estate of Pauline Schrader, Deceased,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE
STATE OF OREGON

PETITION FOR CLARIFICATION OR REHEARING
BY APPELLEE STATE LAND BOARD
OF OREGON

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 21

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Appellees.

APPEAL FROM THE SUPREME COURT OF THE
STATE OF OREGON

PETITION FOR CLARIFICATION OR REHEARING BY APPELLEE STATE LAND BOARD OF OREGON

The State Land Board of Oregon, the petitioner-appellee herein, respectfully petitions and prays that this Court grant clarification or rehearing of its decision and opinion of January 15, 1968 reversing the Oregon Supreme Court in the above-entitled case.

REASON FOR GRANTING CLARIFICATION OR REHEARING

The opinion of the Court read in light of the facts of the case and the concurring opinion of Mr. Justice

Stewart leaves the State of Oregon uncertain as to whether Oregon Revised Statutes Section 111.070 is to be taken as unconstitutional in its entirety; or whether only those portions of the Statute, (1)(b), relating to receipt of funds in the United States and subsection (1)(c) relating to receipt by foreign heirs of funds without confiscation, are found unconstitutional; or whether the statute is only an unconstitutional intrusion into the field of foreign affairs by virtue of its application in the examination of foreign laws and other evidence. For the benefit and guidance of the State of Oregon under the decision of this case the State of Oregon acting through the State Land Board requests clarification of the decision.

As the Court recognized and as was stated in the concurring opinion of Mr. Justice Stewart, in this case there was no evidence presented nor any examination of foreign law and therefore there was no application of the statute except for the entry of default arising from the failure of the heirs to bear their burden of proof and show a reciprocal right of inheritance.

The opinion of the Court does not overrule *Clark v. Allen*, 331 U.S. 503, nor re-examine that ruling and therefore *Clark v. Allen* with its permission for a general reciprocity statute as there examined remains the law.

The opinion in the present case refers to the application of the statute by the state as follows. On page 3, " * * * the history and operation of this Oregon statute make clear that § 111.070 is an intrusion by the State into the field of foreign affairs * * * ." On page 7,

"* * * Yet such forbidden state activity has infected each of the three provisions of § 111.070, as applied by Oregon." On page 11, "* * * The statute as construed seems to make unavoidable judicial criticism of nations *-*-*." Nowhere does the Court state the statute is unconstitutional as Mr. Justice Stewart indicates his position to be in his concurring opinion.

However, the opinion does substantially criticize § 111.070, subsection (1)(b) on page 8 and subsection (1)(c) on page 7. This taken together with the continued existence of *Clark v. Allen* with its consideration of a general reciprocity statute and the recognition that state courts must still "read, construe, and apply laws of foreign nations" leads to the interpretation that a general reciprocity statute would be valid when applied objectively. This indicates § 111.070 is severable; that after severing subsections (1)(b), (1)(c), and (2) as invalid, the remaining section (1), subsection (1)(a) and section (3) constitute a valid general reciprocity statute as in *Clark v. Allen*.

CONCLUSION

Because of the uncertainty as to which of the possible interpretations the Court intend~~s~~ as indicated above the State Land Board of the State of Oregon respectfully urges that the Court clarify the interpretation intended by its decision.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for clarification or rehearing is presented in good faith and not for delay.

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by

WAYNE M. THOMPSON
Assistant Attorney General
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

No. 21.—OCTOBER TERM, 1967.

Oswald Zschernig et al.,
Appellants,
v.
William J. Miller, Ad-
ministrator, et al.

On Appeal From the Supreme
Court of Oregon:

[January 15, 1968.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case concerns the disposition of the estate of a resident of Oregon who died there intestate in 1962. Appellants are decedent's sole heirs and they are residents of East Germany. Appellees include members of the State Land Board that petitioned the Oregon probate court for the escheat of the net proceeds of the estate under the provisions of Ore. Rev. Stat. § 111.070 (1965),¹

¹“(1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:

“(a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such alien is an inhabitant or citizen;

“(b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and

“(c) Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.

“(2) The burden is upon such nonresident alien to establish the

which provides for escheat in cases where a nonresident alien claims real or personal property unless three requirements are satisfied:

(1) the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country;

(2) the right of United States citizens to receive payment here of funds from estates in the foreign country; and

(3) the right of the foreign heirs to receive the proceeds of Oregon estates "without confiscation."

The Oregon Supreme Court held that the appellants could take the Oregon realty involved in the present case by reason of Article IV of the 1923 Treaty with Germany² (44 Stat. 2132, 2135) but that by reason of the

fact of existence of the reciprocal rights set forth in subsection (1) of this section.

"(3) If such reciprocal rights are not found to exist and if no heir, devisee or legatee other than such alien is found eligible to take such property, the property shall be disposed of as escheated property."

² Article IV provides:

"Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident; were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the national of the country from which such proceeds may be drawn.

"Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their

same Article, as construed in *Clark v. Allen*, 331 U. S. 503, they could not take the personalty. 243 Ore. 567, 412 P. 2d 781; 343 Ore. 592, 415 P. 2d 15. We noted probable jurisdiction. 386 U. S. 1030.

The Department of Justice, appearing as *amicus*, submits that, although the 1923 Treaty is still in force, *Clark v. Allen* should be overruled insofar as it construed the personalty provision of Article IV. That portion of Article IV speaks of the rights of "nationals of either High Contracting Party" to dispose of "their personal property of every kind within the territories of the other." That literal language and its long consistent construction, we held in *Clark v. Allen*, "does not cover personalty located in this country and which an American citizen undertakes to leave to German nationals." 331 U. S., at 516.

We do not accept the invitation to re-examine our ruling in *Clark v. Allen*. For we conclude that the history and operation of this Oregon statute make clear that § 111.070 is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress. See *Hines v. Davidowitz*, 312 U. S. 52, 63.

As already noted³ one of the conditions of inheritance under the Oregon statute requires "proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confisca-

heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases."

³ *Supra*, n. 1.

tion, in whole or in part, by the governments of such foreign countries," the burden being on the nonresident alien to establish that fact.

This provision came into Oregon's law in 1951. Prior to that time the rights of aliens under the Oregon statute were defined in general terms of reciprocity,⁴ similar to the California Act which we had before us in *Clark v. Allen*, 331 U. S., at 506, n. 1.

We held in *Clark v. Allen* that a general reciprocity clause did not on its face intrude on the federal domain. 331 U. S. 516-517. We noted that the California statute, then a recent enactment, would have only "some incidental or indirect effect in foreign countries." *Id.*, at 517.⁵

Had that case appeared in the posture of the present one, a different result would have obtained. We were there concerned with the words of a statute on its face, not the manner of its application. State courts, of

⁴ Ore. Comp. L. Ann. § 61-107 (1940).

⁵ In *Clark v. Allen*, 331 U. S. 503, the District Court had held the California reciprocity statute unconstitutional because of legislative history indicating that the purpose of the statute was to prevent American assets from reaching hostile nations preparing for war on this country. *Crowley v. Allen*, 52 F. Supp. 850, 853 (D. C. N. D. Calif.). But when the case reached this Court, petitioner contended that the statute was invalid not because of the legislature's motive, but because on its face the statute constituted "an invasion of the exclusively Federal field of control over our foreign relations." In discussing how the statute was applied, petitioner noted that California courts had accepted as conclusive proof of reciprocity the statement of a foreign ambassador that reciprocal rights existed in his nation. *Id.*, pp. 73-74. Thus we had no reason to suspect that the California statute in *Clark v. Allen* was to be applied as anything other than a general reciprocity provision requiring just matching of laws. Had we been reviewing the later California decision of *Estate of Gogabashvele*, 195 Cal. App. 2d 503, 16 Cal. Rptr. 77, see n. 6, *infra*, the additional problems we now find with the Oregon provision would have been presented.

course, must frequently read, construe, and apply laws of foreign nations. It has never been seriously suggested that state courts are precluded from performing that function, although there is a possibility, albeit remote, that any holding may disturb a foreign nation—whether the matter involves commercial cases, tort cases, or some other type of controversy. At the time *Clark v. Allen* was decided, the case seemed to involve no more than a routine reading of foreign laws. It now appears that in this reciprocity area under inheritance statutes, the probate courts of various States have launched inquiries into the type of governments that obtain in a particular foreign nation—whether aliens under ~~that~~ law have enforceable rights, whether the so-called “rights” are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations are credible or made in good faith, whether there is in the actual administration in the particular foreign system of law any element of confiscation.

In a California case, involving a reciprocity provision, the United States made the following representation:

“The operation and effect of the statute is inextricably enmeshed in international affairs and matters of foreign policy. The statute does not work disinheritance of, or affect ownership of property in California by, any group or class, but on the contrary operates in fields exclusively for, and preempted by, the United States; namely, the control of the international transmission of property, funds, and credits, and the capture of enemy property. The statute is not an inheritance statute, but a statute of confiscation and retaliation.” *In re Bevilacqua's Estate*, 161 P. 2d 589, 593 (Calif. D. C. App.) superseded by 31 Cal. 2d 580, 191 P. 2d 752.

In its brief *amicus curiae*, the Department of Justice states that: "The government does not . . . contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations."

The Government's acquiescence in the ruling of *Clark v. Allen* certainly does not justify extending the principle of that case, as we would be required to do here to uphold the Oregon statute as applied; for it has more than "some incidental or indirect effect in foreign countries," and its great potential for disruption or embarrassment makes us hesitate to place it in the category of a diplomatic bagatelle.

As we read the decisions that followed in the wake of *Clark v. Allen*, we find that they radiate some of the attitudes of the "cold war," where the search is for the "democracy quotient" of a foreign regime as opposed to the Marxist theory.⁶ The Oregon statute introduces the concept of "confiscation," which is of course opposed

⁶ See *Estate of Gogabashvele*, 195 Cal. App. 2d 503, 16 Cal. Rptr. 77, disapproved in *Estate of Larkin*, 65 Cal. 2d 60, 52 Cal. Rptr. 441, 416 P. 2d 473, and *Estate of Chicherna*, — Cal. 2d —, 57 Cal. Rptr. 135, 424 P. 2d 687. One commentator has described the *Gogabashvele* decision in the following manner:

"The court analyzed the general nature of rights in the Soviet system instead of examining whether Russian inheritance rights were granted equally to aliens and residents. The court found Russia had no separation of powers, too much control in the hands of the Communist Party, no independent judiciary, confused legislation, unpublished statutes, and unrepealed obsolete statutes. Before stating its holding of no reciprocity, the court also noted Stalin's crimes, the Beria trial, the doctrine of crime by analogy, Soviet xenophobia, and demonstrations at the American Embassy in Moscow unhindered by the police. The court concluded that a leading Soviet jurist's construction of article 8 of the law enacting the R. S. F. S. R. Civil Code seemed modeled after Humpty Dumpty, who said, 'When I use a word . . . it means just what I choose it to mean—neither more nor less.'" Note, 55 Calif. L. Rev. 592, 594, n. 10 (1967).

to the Just Compensation Clause of the Fifth Amendment. And this has led into minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should "not preclude wonderment as to how many may have been denied 'the right to receive'" See *Land Board v. Kolovrat*, 220 Ore. 448, 461-462, 349 P. 2d 255, 262, rev'd *sub nom. Kolovrat v. Oregon*, 366 U. S. 187, on other grounds.

That kind of state involvement in foreign affairs and international developments—matters which the Constitution entrusts solely to the Federal Government—is not sanctioned by *Clark v. Allen*. Yet such forbidden state activity has infected each of the three provisions of § 111.070, as applied by Oregon.

In *State Land Board v. Pekarek*, 234 Ore. 74, 378 P. 2d 734, the Oregon Supreme Court in ruling against a Czech claimant because he had failed to prove the "benefit" requirement of subsection (1)(c) of the statute said:

"Assuming, without deciding, that all of the evidence offered by the legatees was admissible, it can be given relatively little weight. The statements of Czechoslovakian officials must be judged in light of the interest which they had in the acquisition of funds for their government. Moreover, in judging the credibility of these witnesses we are entitled to take into consideration the fact that declarations of government officials in communist-controlled countries as to the state of affairs existing within their borders do not always comport with the actual facts." *Id.*, 83, 378 P. 2d, at 738.

Yet in *State Land Board v. Schwabe*, 240 Ore. 82, 400 P. 2d 10, where the certificate of the Polish Ambas-

sador was tendered against the claim that the inheritance would be confiscated, abroad, the Oregon court, appraising the current attitude of Washington, D. C. toward Warsaw, accepted the certificate as true. *Id.*, at 84, 400 P. 2d, at 11.

In *State Land Board v. Rogers*, 219 Ore. 233, 245, 347 P. 2d 57, the court held Bulgarian heirs had failed to prove the requirement of what is now § (1)(b) of the reciprocity statute, the "right" of American heirs of Bulgarian decedents to get funds out of Bulgaria into the United States. Such transmission of funds required a license from the Bulgarian National Bank, but the court held the fact that licenses were regularly given insufficient, because they were issued only at the discretion or "whim" of the bank. *Id.*, at 245, 347 P. 2d, at 63.⁷

As one reads the Oregon decisions, it seems that foreign policy attitudes, the freezing or thawing of the "cold war," and the like are the real desiderata.⁸ Yet they of

⁷ The *Rogers* case, we are advised, prompted the Government of Bulgaria to register a complaint with the State Department, as disclosed by a letter of November 20, 1967, written by a State Department adviser to the Oregon trial court stating: "The Government of Bulgaria has raised with this Government the matter of difficulties reportedly being encountered by Bulgarian citizens resident in Bulgaria in obtaining the transfer to them of property or funds from estates probated in this country, some under the jurisdiction of the State of Oregon. . . ."

⁸ Such attitudes are not confined to the Oregon courts. Representative samples from other States would include statements in the New York courts, such as "This court would consider sending money out of this country and into Hungary tantamount to putting funds within the grasp of the Communists," and "If this money were turned over to the Russian authorities, it would be used to kill our boys and innocent people in Southeast Asia. . . ." Heyman, *The Nonresident Alien's Right to Succession Under the "Iron Curtain Rule,"* 52 Nw. U. L. Rev. 221, 234 (1957). In Pennsylvania, a judge stated at the trial of a case involving a Soviet claimant that "If you want to say that I'm prejudiced, you can, because when it

course are matters for the Federal Government, not for local probate courts.

This is as true of (1)(a) of \$ 111.070 as it is of (1)(b) and (1)(c). In *Clostermann v. Schmidt*, 215 Ore. 55, 332

comes to Communism I'm a bigoted anti-Communist." And another judge exclaimed, "I am not going to send money to Russia where it can go into making bullets which may one day be used against my son." A California judge, upon being asked if he would hear argument on the law, replied, "No, I won't send any money to Russia." The judge took "judicial notice that Russia kicks the United States in the teeth all the time," and told counsel for the Soviet claimant that "I would think your firm would feel it honor bound to withdraw as representing the Russian government. No American can make it too strong." Berman, *Soviet Heirs in American Courts*, 62 Col. L. Rev. 257, n. 3 (1962).

A particularly pointed attack was made by Judge Musanno of the Pennsylvania Supreme Court, where he stated with respect to the Pennsylvania Act that:

"It is a commendable and salutary piece of legislation because it provides for the safekeeping of these funds even with accruing interest, in the steelbound vaults of the Commonwealth of Pennsylvania until such time as the Iron Curtain lifts or sufficiently cracks to allow honest money to pass through and be honestly delivered to the persons entitled to them. Otherwise, wages and other monetary rewards faithfully earned under a free enterprise democratic system could be used by Communist forces which are committed to the very destruction of that free enterprising world of democracy." *Belemecich Estate*, 411 Pa. 506, 508, 192 A. 2d 740, 741, rev'd, *sub nom. Consul General of Yugoslavia v. Pennsylvania*, 375 U. S. 395, on authority of *Kolovrat v. Oregon*, 366 U. S. 187.

And further:

"... Yugoslavia, as the court below found, is a satellite state where the residents have no individualistic control over their destiny, fate or pocketbooks, and where their politico-economic horizon is raised or lowered according to the will, wish or whim of a self-made dictator." *Id.*, at 509, 192 A. 2d, at 742.

"All the known facts of a Sovietized state lead to the irresistible conclusion that sending American money to a person within the borders of an Iron Curtain country is like sending a basket of food

P. 2d 1036, the court—applying the predecessor of (1)(a)—held that not only must the foreign law give inheritance rights to Americans, but the political body making the law must have “membership in the family of nations” (*id.*, at 65, 332 P. 2d, at 1041), because the purpose of the Oregon provision was to serve as “an inducement to foreign nations to so frame the inheritance laws of their respective countries in a manner which would insure to Oregonians the same opportunities to inherit and take personal property abroad that they enjoy in the state of Oregon.” *Id.*, at 68, 332 P. 2d, at 1042.

In *In re Estate of Krachler*, 199 Ore. 448, 263 P. 2d 769, the court observed that the phrase “reciprocal right”

to Little Red Ridinghood in care of her ‘grandmother.’ It could be that the greedy, gluttonous grasp of the government collector in Yugoslavia does not clutch as rapaciously as his brother confiscators in Russia, but it is abundantly clear that there is no assurance upon which an American court can depend that a named Yugoslavian individual beneficiary of American dollars will have anything left to shelter, clothe and feed himself once he has paid financial involuntary tribute to the tyranny of a totalitarian regime.” *Id.*, at 511, 192 A. 2d, at 742-743.

Another example is a concurring opinion by Justice Doyle in *In re Hosova's Estate*, 143 Mont. 74, 387 P. 2d 305.

“In this year 1963, the Central Committee of the Communist Party of the U. S. S. R. issued the following directive to all of its member, ‘We fully stand for the destruction of imperialism and capitalism. We not only believe in the inevitable destruction of capitalism, but also are doing everything for this to be accomplished by way of the class struggle, and as soon as possible.’

“Hence, in affirming this decision the writer is knowingly contributing financial aid to a Communist monolithic satellite, fanatically dedicated to the abolishing of the freedom and liberty of the citizens of this nation:

“By reason of self-hypnosis and failure to understand the aims and objective of the international Communist conspiracy, in the year 1946, Montana did not have statutes to estop us from making cash contributions to our own ultimate destruction as a free nation.” *Id.*, at 85-86, 387 P. 2d, at 311.

in what is now part (1)(a) meant a claim "that is enforceable by law." *Id.*, at 455, 263 P. 2d, at 773. Although certain provisions of the written law of Nazi Germany appeared to permit Americans to inherit, they created no "right," since Hitler had absolute dictatorial powers and could proscribe to German courts rules and procedures at variance with the general law. Bequests "grossly opposed to the sound sentiment of the people" would not be given effect. *Id.*, at 503, 263 P. 2d, at 794.⁹

In short, it would seem that Oregon judges in construing § 111.070 seek to ascertain whether "rights" protected by foreign law are the same "rights" that citizens of Oregon enjoy. If, as in the *Rogers* case, the alleged foreign "right" may be vindicated only through Communist-controlled state agencies, then there is no "right" of the type § 111.070 requires. The same seems to be true if enforcement may require approval of a Fascist dictator, as in *Krachler*. The statute as construed seems to make unavoidable judicial criticism of

⁹ In *Mullart v. State Land Board*, 222 Ore. 463, 353 P. 2d 531, the court had little difficulty finding that reciprocity existed with Estonia. But it took pains to observe that in 1941 Russia "moved in and overwhelmed it [Estonia] with its military might. At the same time the Soviet hastily and cruelly deported about 60,000 of its people to Russia and Siberia, and, in addition, exterminated many of its elderly residents. This policy of destroying or decimating families and rendering normal economic life chaotic continued long afterward." *Id.*, at 467, 353 P. 2d, at 534.

"[A]ny effort to communicate with persons in Estonia exposes such persons to possible death or exile to Siberia. It seems that the Russians scrutinize all correspondence from friends of Estonians in lands where freedom prevails and subject the recipient to suspicion of a relationship inimical to the Soviet This line of testimony has the support of reliable historical matter of which we take notice. We mention it as explaining the futility of attempting, under the circumstances, to secure more cogent evidence than hearsay in the matter." *Id.*, at 476, 353 P. 2d, at 537-538.

nations established on a more authoritarian basis than our own.

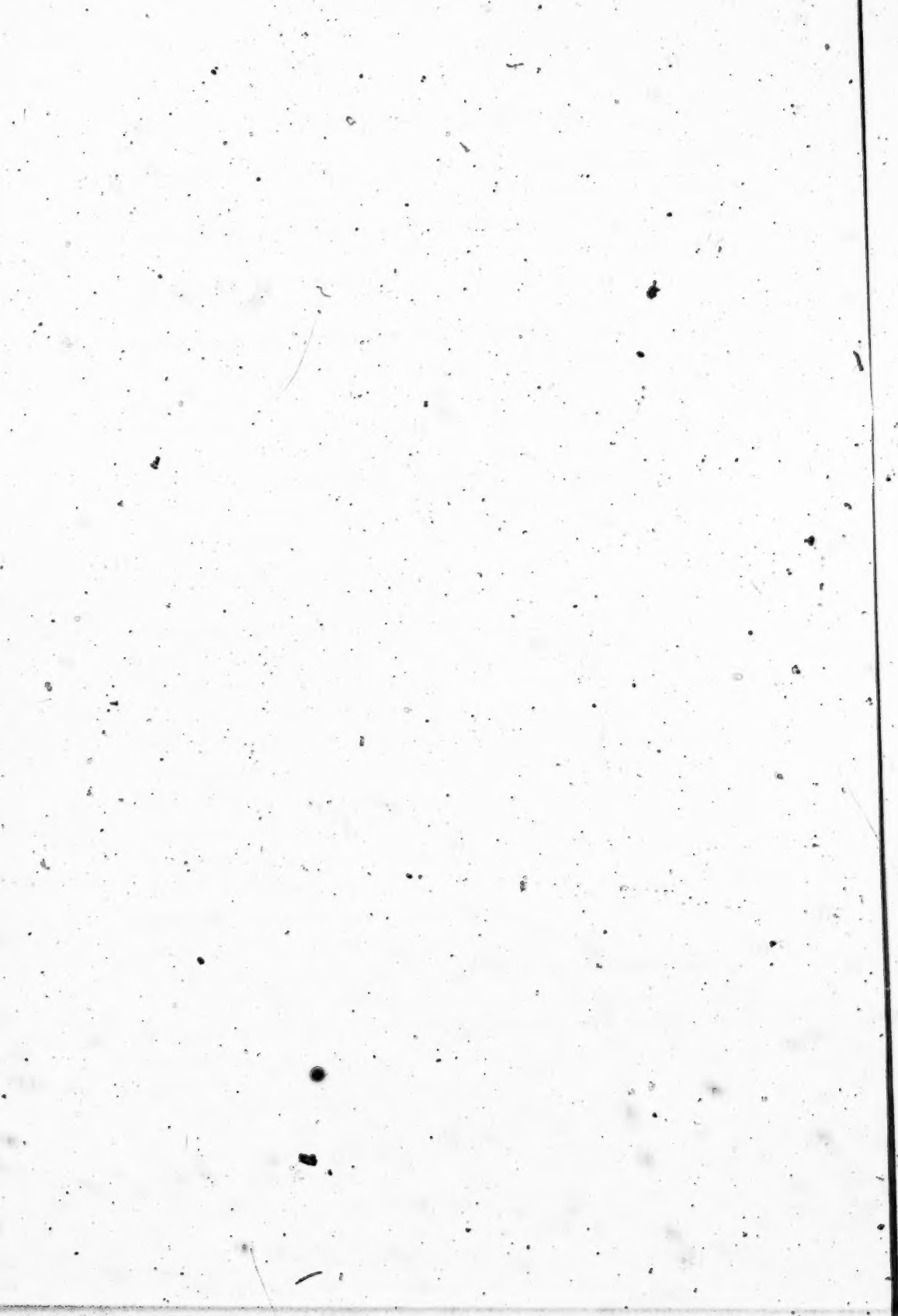
It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way. The practice of state courts in withholding remittances to legatees residing in Communist countries or in preventing them from assigning them is notorious.¹⁰ The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. See Miller, *The Corporation as a Private Government in the World Community*, 46 Va. L. Rev. 1539, 1542-1549 (1960). Where those laws conflict with a treaty, they must bow to the superior federal policy. See *Kolovrat v. Oregon*, 366 U. S. 187. Yet, even in absence of a treaty, a State's policy may disturb foreign relations. As we stated in *Hines v. Davidowitz*, *supra*, at 64: "Experience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government." Certainly a State could not deny admission to a traveler from East Germany nor bar its citizens from going there. *Passenger Cases*, 7 How. 283; cf. *Crandall v. Nevada*, 6 Wall. 35; *Kent v. Dulles*, 357 U. S. 116. If there are to be such restraints, they must be provided by the Federal Government. The present Oregon law is not as gross an intrusion in the federal domain as those others might be. Yet, as we have said, it has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems.

¹⁰ See Berman, *Soviet Heirs in American Courts*, 62 Col. L. Rev. 257 (1962); Chaitkin, *The Rights of Residents of Russian and its Satellites to Share in Estates of American Decedents*, 25 S. Cal. L. Rev. 297 (1952).

The Oregon law does, indeed, illustrate the dangers which are involved if each State, speaking through its probate courts, is permitted to establish its own foreign policy.

Reversed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.



SUPREME COURT OF THE UNITED STATES

No. 21.—OCTOBER TERM, 1967.

Oswald Zschoernig et. al.,
Appellants,

v.

William J. Miller, Ad-
ministrator, et al.

On Appeal From the Supreme
Court of Oregon.

[January 15, 1968.]

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, concurring.

While joining the opinion of the Court, I would go further. Under the Oregon law involved in this case, a foreigner cannot receive property from an Oregon decedent's estate unless he first meets the burden of proving, to the satisfaction of an Oregon court, that his country (1) grants to United States citizens a "reciprocal right" to take property on the same terms as its own citizens; (2) assures Americans the right "to receive payment" here of funds originating from estates in that country; and (3) gives its own citizens the "benefit, use or control" of property received from an Oregon estate "without confiscation, in whole or in part." The East German claimants in this case did not show in the Oregon courts that their country could meet any one of these criteria. I believe that all three of the statutory requirements on their face are contrary to the Constitution of the United States.

In my view, each of the three provisions of the Oregon law suffers from the same fatal infirmity. All three launch the State upon a prohibited voyage into a domain of exclusively federal competence. Any realistic attempt to apply any of the three criteria would necessarily involve the Oregon courts in an evaluation, either expressed or implied, of the administration of foreign

law, the credibility of foreign diplomatic statements, and the policies of foreign governments. Of course state courts must routinely construe foreign law in the resolution of controversies properly before them, but here the courts of Oregon are thrust into these inquiries only because the Oregon legislature has framed its inheritance laws to the prejudice of nations whose policies it disapproves and thus has trespassed upon an area where the Constitution contemplates that only the National Government shall operate. "For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." *Chinese Exclusion Case*, 130 U. S. 581, 606. "Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." *Hines v. Davidowitz*, 312 U. S. 52, 63.

The Solicitor General, as *amicus curiae*, says that the Government does not "contend that the application of the Oregon escheat statute in the circumstances of this case unduly interferes with the United States' conduct of foreign relations." But that is not the point. We deal here with the basic allocation of power between the States and the Nation. Resolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department. Today, we are told, Oregon's statute does not conflict with the national interest. Tomorrow it may. But, however that may be, the fact remains that the conduct of our foreign affairs is entrusted under the Constitution to the National Government, not to the probate courts of the several States. To the extent that *Clark v. Allen*, 331 U. S. 503, is inconsistent with these views, I would overrule that decision.

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MR. JUSTICE HARLAN, concurring in the result.

Although I agree with the result reached in this case, I am unable to subscribe to the Court's opinion, for three reasons. *First*, by resting its decision on the constitutional ground that this Oregon inheritance statute infringes the federal foreign relations power, without pausing to consider whether the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany¹ itself vitiates this application of the state statute, the Court has deliberately turned its back on a cardinal principle of judicial review. *Second*, correctly construed the 1923 treaty, in my opinion, renders Oregon's application of its statute in this instance impermissible, thus requiring reversal of the state judgment. *Third*, the Court's constitutional holding, which I reach only because the majority has done so, is in my view untenable. The impact of today's holding on state power in this field, and perhaps in other areas of the law as well, justifies a full statement of my views upon the case.

I.

Even in this age of rapid constitutional change, the Court has continued to proclaim adherence to the principle that decision of constitutional issues should be

¹ Dec. 8, 1923, 44 Stat. 2132, T. S. No. 725.

avoided wherever possible.² In his celebrated concurring opinion in *Ashwander v. Valley Authority*, 297 U. S. 288, 341, Mr. Justice Brandeis listed the self-imposed rules by which the Court has avoided the unnecessary decision of constitutional questions. In his fourth rule he dealt with the situation presented by this case, declaring that:

"The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be disposed of on either of two grounds, one involving a constitutional question, the other a question of statutory interpretation or general law, the Court will decide only the latter. *Siler v. Louisville & Nashville R. Co.*, 213 U. S. 175, 191; *Light v. United States*, 220 U. S. 523, 538." *Id.*, at 347.³

The above rule should control the disposition of this case, for there is what I think must be regarded, within the meaning of *Ashwander*, as a nonconstitutional ground on which the decision could be founded. Although the appellant chose to argue only the constitutional question, the United States, as *amicus curiae*, forcefully, and I believe correctly, contended that the full relief sought by the appellant should be afforded by overruling the construction of the 1923 treaty, rather than the constitutional holding, in *Clark v. Allen*, 331 U. S. 503. The Court simply states that "We do not accept the invita-

² See, e. g., *Giles v. Maryland*, 386 U. S. 66, 80-81; *Hamm v. City of Rock Hill*, 379 U. S. 306, 316; *Bell v. Maryland*, 378 U. S. 226, 237; *Communist Party v. Catherwood*, 367 U. S. 389, 392; *Poe v. Ullman*, 367 U. S. 497, 503; *Machinists v. Street*, 367 U. S. 740, 749.

³ See also *Alma Motor Co. v. Timken Co.*, 329 U. S. 129, 136-137.

tion to re-examine our ruling in *Clark v. Allen*." See p. —, *ante*. I believe that the principle of avoiding unnecessary constitutional adjudication obliges us to accept that invitation and to inquire whether the treaty might provide an adequate alternative ground for affording the appellants their due.⁴

II.

Article IV of the 1923 treaty with Germany provides:

"Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interest therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.

"Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territory of the other, by

⁴ It is true, of course, that the treaty would displace the Oregon statute only by virtue of the Supremacy Clause of the Constitution. Yet I think it plain that this fact does not render inapplicable the teachings of *Ashwander*. Disposition of the case pursuant to the treaty would involve no interpretation of the Constitution, and this is what the *Ashwander* rules seek to avoid. Cf. *Swift & Co., Inc. v. Wickham*, 382 U. S. 111, 126-127.

testament, donation, or otherwise, and their heirs, legatees and donees, of whatever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose of the same at their pleasure, subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territory such property may be or belong shall be liable to pay in like cases."

In *Clark v. Allen*, *supra*, this Court considered the application of this treaty provision to a case much like the present one. In *Clark* one who was apparently an American citizen died in California and left her real and personal property to German nationals. The California Probate Code provided that

"The right of aliens not residing within the United States . . . to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries."

The *Clark* Court first considered whether the 1923 treaty with Germany had survived the events of the years 1923-1947. It concluded that the treaty was still in effect

and that it clearly entitled the German citizens to take the real estate left them by the decedent.

The Court then went on to discuss the application of the treaty to personalty. It noted that a practically identical provision of a treaty with Wurttemberg had been held in the 1860 case of *Frederickson v. Louisiana*, 23 How. 445, not to govern "the case of a citizen or subject of the respective countries residing at home and disposing of [personal] property there in favor of a citizen or subject of the other . . .," *id.*, at 447-448, and that the *Frederickson* decision had been followed in 1947 cases involving three other treaties.⁵ The Court then said:

"The construction adopted by those cases is, to say the least, permissible when the syntax of the sentences dealing with realty and personalty is considered. So far as realty is concerned, the testator includes 'any person'; and the property covered is that within the territory of either of the high contracting parties. In case of personalty, the provision governs the right of 'nationals' of either contracting party to dispose of their property within the territory of the 'other' contracting party; and it is 'such personal property' that the 'heirs, legatees, and donees' are entitled to take.

"Petitioner, however, presents a detailed account of the history of the clause which was not before the Court in *Frederickson v. Louisiana*, *supra*, and which bears out the construction that it grants the foreign heir the right to succeed to his inheritance or the proceeds thereof. But we do not stop to review that history. For the consistent judicial construction of the language since 1860 has given it

⁵ *Petersen v. Iowa*, 245 U. S. 170; *Duus v. Brown*, 245 U. S. 176; *Skarderud v. Tax Commission*, 245 U. S. 633.

a character which the treaty-making agencies have not seen fit to alter. And that construction is entirely consistent with the plain language of the treaty. We therefore do not deem it appropriate to change that construction at this late date, even though as an original matter the other view might have much to commend it." 331 U. S., at 515-516.

In the case now before us, an American citizen died in Oregon, leaving property to relatives in the Soviet Zone of Germany. An Oregon statute conditioned a nonresident alien's right to inherit property in Oregon upon the existence of a reciprocal right of American citizens to inherit in the alien's country upon the same terms as citizens of that country; upon the right of American citizens to receive payment within the United States from the estates of decedents dying in that country; and upon proof that the alien heirs of the American decedent would receive the benefit, use, and control of their inheritance without confiscation.⁶ The Oregon Supreme Court affirmed the finding of the trial court that the evidence did not establish that American citizens were accorded reciprocal rights to take property from or to receive the proceeds of East German estates. However, it found that the 1923 treaty was still effective with respect to East Germany, and consequently held that under *Clark v. Allen* the East German heirs must be permitted to take the real, though not the personal, property despite the Oregon statute.

I, too, believe that the 1923 treaty is still applicable to East Germany.⁷ However, I am satisfied that *Clark*

⁶ The statute appears in the majority opinion at p. —, n. 1, *ante*.

⁷ The appellees argue that a substantial part of the 1923 treaty has been terminated or abrogated by the 1954 Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany, 7 U. S. T. 1839; T. I. A. S. No. 3593. However, Article XXVI of the 1954 treaty specifies that it extends only to "all areas

v. *Allen* should not be followed insofar as the Court there held that the words of the 1923 treaty must be taken to bear the meaning ascribed to them in *Frederickson v. Louisiana* because of the "consistent judicial construction of that language since 1860." This reasoning assumes both that the drafters of the 1923 treaty knew of the *Frederickson* decision and that they thought *Frederickson* would control the interpretation of that treaty. The first assumption seems open to substantial doubt, and the second is not beyond question.

There is evidence that in 1899, almost 40 years after the *Frederickson* decision, the State-Department's treaty draftsmen were not aware of the meaning given to the crucial treaty language in that opinion. For in 1895 the British Ambassador initiated correspondence with the State Department in which he proposed a treaty which would assure that "no greater charges [would] be imposed . . . on real or personal property in the United States inherited by British subjects, whether domiciled within the union or not, than are imposed upon property inherited by American citizens," in return for provisions assuring to American citizens reciprocal rights in Great Britain.⁸ The ensuing treaty of 1899⁹ contained language substantially identical to that in the subsequent 1923 treaty with Germany. Since it is highly unlikely that the British Ambassador intended that British subjects should be able to inherit personal property from American decedents only if those decedents happened

of land and water under the sovereignty or authority of" the Federal Republic of Germany, and to West Berlin. The United States does not challenge the holding of the Oregon Supreme Court that the 1923 treaty still applies to East Germany. See Brief for the United States as *Amicus Curiae*, p. 6, n. 5.

⁸ 125 Notes from Great Britain, Sept. 24, 1895, MSS., Nat. Archives.

⁹ Treaty of March 2, 1899, with Great Britain, 31 Stat. 1939.

also to be British subjects, or that the State Department so understood him, it is clear enough that the draftsmen in 1899 must have been unaware of *Frederickson*.

It is also conceivable that the drafters of the 1923 treaty thought that *Frederickson* was inapplicable to that treaty. Because the article of the Wurttemberg treaty dealing with realty was not brought to the attention of the *Frederickson* Court, the *Frederickson* decision was based largely upon the Court's understanding that

"The case of a citizen or subject of the respective countries residing at home, and disposing of property there in favor of a citizen of the other, was not in the contemplation of the contracting Powers, and is not embraced in this article of the treaty."
23 How., at 447-448.

Hence, the drafters of the 1923 treaty might have assumed that *Frederickson* was not applicable to that treaty, in which the inclusion of the realty provision made it clear that the parties did consider the case of a citizen dying in his own country. In view of these indications that the draftsmen of the 1923 treaty very likely did not intend that the words of the treaty should bear the meaning given them in *Frederickson*, it seems to me that the Court in *Clark v. Allen* erred in holding the question foreclosed. Accordingly, a *de novo* inquiry into the meaning of the treaty seems entirely appropriate.

III.

The language of Article IV of the 1923 treaty with Germany, which was quoted earlier, is based upon Article X of the Treaty of 1785 with Prussia.¹⁰ Article X provided:

"The citizens or subjects of each party shall have power to dispose of their personal goods within the

¹⁰ Sept. 10, 1785, 8 Stat. 84, 88.

jurisdiction of the other, by testament, donation or otherwise and their representatives, being subjects or citizens of the other party, shall succeed to their said personal goods . . . and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases. . . . And where, on the death of any person holding real estate within the territories of the one party, such real estate would but for the laws of the land descend on a citizen or subject of the other, were he not disqualified by alienage, such subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all rights of detraction on behalf of the government of the respective states."

This part of the treaty with Prussia was in turn founded upon earlier treaties with France, the Netherlands, and Sweden.¹¹ The treaty of 1778 with France specifically freed American citizens from the burdens of two restrictions on the right of aliens to dispose of or inherit property which were then common in the civil law countries: the *droit d'aubaine* and the *droit de détraction*. The *droit d'aubaine* was the feudal right of the sovereign to appropriate the property of an alien who died within the realm; an aspect of this doctrine was "the complementary incapacity of an alien to inherit, even from a citizen." *Nielsen v. Johnson*, 279 U. S. 47, 55, n. 2.¹² The *droit d'aubaine* was replaced during the 18th century by the *droit de détraction*, a tax "imposed upon the right of an alien to [inherit] the property of

¹¹ See Art. XI, Treaty of Feb. 6, 1778, with France, 8 Stat. 12, 18; Art. VI, Treaty of Oct. 8, 1782, with the Netherlands, 8 Stat. 32, 36; Art. VI, Treaty of April 3, 1783, with Sweden, 8 Stat. 60, 64.

¹² See also 3 Vattel, *The Law of Nations* § 112, at 147-148 (1916 ed.); Wheaton, *Elements of International Law* § 82, at 115-116 (1866 ed.).

persons dying within the realm," *Nielsen v. Johnson*, *supra*, at 56, n. 2, and levied upon the removal of the inherited property by the alien from the decedent's country.¹³

The 1782 treaty with the Netherlands and the 1783 treaty with Sweden were framed more generally. They provided that:

"The subjects of the contracting parties in the respective states, may freely dispose of their goods and effects, either by testament, donation or otherwise, in favor of such persons as they think proper; and their heirs in whatever place they shall reside, shall receive the succession" ¹⁴

The 1785 treaty with Prussia, which is substantially identical to the 1923 treaty, differed from the earlier treaties in two important respects. First, it dealt separately with realty and with personalty.¹⁵ This separate treatment stemmed from the fact that at common law aliens could freely inherit personalty but could not succeed to realty.¹⁶ The Continental Congress, apparently fearing that under the Articles of Confederation it lacked power thus to alter the laws of the States, instructed the Commissioners who negotiated the treaty "That no rights be stipulated for aliens to hold real property within these States, this being utterly inadmissible by their laws or policy," but that a person who would

¹³ See Borchard, *Diplomatic Protection of Citizens Abroad* § 39, at 88 (1915 ed.); 4 Miller, *Treaties and other International Acts of the United States of America* 547 (1934).

¹⁴ The quotation is from the Swedish treaty. The wording of the Dutch treaty differs only slightly.

¹⁵ The earlier treaties used the words "effects" and "goods," which have been held to include realty. *Todok v. Union State Bank*, 281 U. S. 449, 454.

¹⁶ See 1 Blackstone, *Commentaries* 372; 2 Kent, *Commentaries* 61-63.

inherit personalty but for his alienage should be permitted to sell the property and withdraw the proceeds within a reasonable time.¹⁷

The other important difference was that the provision of the Prussian treaty dealing with the disposal and inheritance of personalty, though generally based upon the corresponding language in the Dutch and Swedish treaties, was altered by the addition of the phrase "within the jurisdiction of the other," so as to read:

"The citizens or subjects of each party shall have power to dispose of their personal goods *within the jurisdiction of the other*, by testament, donation or otherwise and their representatives, being subjects or citizens of the other party, shall succeed to their said personal goods . . . and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases" (Emphasis added.)

There is no precise indication why this phrase was added. Its function seems to have been to define more clearly than the earlier treaties the cases in which disposition of property required protection from the *droit d'aubaine*, namely those instances when property was disposed of in a country other than that of the citizenship of the owner. Under this construction, the phrase would modify the word "dispose" rather than the words "personal goods" (or "personal property" in the 1923 treaty). The right of succession would be unaffected, since the words "said personal goods" (or "such personal property" in the 1923 treaty) would refer to all "personal goods" (or to "personal property of every kind" in the 1923 treaty) and not merely to those personal goods within the territory of the other party to the treaty.

¹⁷ See XXVI Journals of the Continental Congress 357, 360-361.

Several factors point to the conclusion that this construction is correct, and that the phrase "within the jurisdiction of the other" was not intended to modify the words "personal goods" and thereby to limit the right of succession. The addition of the phrase "within the jurisdiction of the other" was unrelated to the problem of freeing rights of succession from the *droit de détraction*, since that exaction was imposed upon succession by an alien to the property of any person dying within the realm, regardless of the citizenship of the decedent. The phrase therefore cannot have been intended to modify the right of succession in order to enlarge or contract this freedom.

Moreover, the terms of the newly added real property clause affirmatively indicate that the "personal goods" clause of the 1785 treaty (and therefore the "personal property" clause of the 1923 treaty) was intended to confer the right to inherit personal property from both alien and citizen decedents. The first draft of the 1785 treaty was substantially similar to the earlier Dutch and Swedish treaties, and quite clearly would have permitted aliens to succeed to real or personal property regardless of whether the decedent died in his own country.¹⁸ However, as noted earlier, the Continental Congress out of caution instructed the Commissioners that aliens should not be allowed by the treaty to succeed to and hold real estate but should be limited to sale of the land and removal of the proceeds. This indicates that the real estate clause was intended purely as a limitation on the rights accorded with respect to personal property and was not supposed to confer any greater rights. The real property clause certainly permitted inheritance from both alien and citizen, for it allowed succession "on the death of any person holding real estate." This was

¹⁸ See 2 Diplomatic Correspondence of the United States 1783-1789, at 111, 116-117.

acknowledged by the Court in *Clark v. Allen, supra*, at 517, with respect to the 1923 treaty. It would seem to follow that the more liberal personal property clause was also intended to allow inheritance regardless of the decedent's nationality.

The conclusion that the personal property clause of the 1785 (and hence of the 1923) treaty was intended to grant a right of inheritance no matter what the decedent's citizenship finds additional support in the State Department's interpretations of similar treaty provisions during the 19th century. When negotiating substantially identical provisions in treaties with German states in the 1840's, the then Minister to Prussia, Mr. Wheaton, indicated his belief that the proposed treaties would protect "naturalized Germans, resident in the U[nited] States, who are entitled to inherit the property of their relations deceased in Germany."¹⁹ There was no suggestion that the treaties would apply only to real property or, with respect to personal property, only to the small class of naturalized Germans whose "relations" in Germany happened also to be American citizens. In responding to Mr. Wheaton, the State Department instructed him to take as his "general guide" the treaty with Prussia and others similarly worded, and instructed him that the object should be "the removal of all obstructions . . . to the withdrawal from the one country, by the citizens or subjects of the other, of any property which may have been transferred to them by . . . will—or which they may have inherited *ab intestato*."²⁰

Later in the century, after the *Frederickson* decision, the State Department several times indicated that it

¹⁹ Despatch, Wheaton to Legare, June 14, 1843, 3 Despatches, Prussia, No. 226, MSS., Nat. Archives; see 4 Miller, *Treaties and other International Acts of the United States of America* 547-548 (1934).

²⁰ 4 Miller, *supra*, at 546, 548.

regarded similarly worded treaties as assuring citizens of one country the right to inherit personal property of citizens of the other dying in their own country. In 1868 and 1880 the Department asserted, under a similarly worded treaty,²¹ the right of American citizens to inherit personal property of Swiss decedents who died in Switzerland.²² In 1877, it took the same position with respect to the rights of Russian heirs to inherit the personal property of American decedents under a like treaty with Russia.²³ The negotiations leading to the British treaty of 1899, which have previously been described, reveal the same attitude.

This course of history, coupled with the general principle that "where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal construction is to be preferred,"²⁴ lead in my opinion to the conclusion that Article IV of the 1923 treaty should be construed as guaranteeing to citizens of the contracting parties the right to inherit personal property from a decedent who dies in his own country. I would overrule *Frederickson v. Louisiana*, *supra*, and *Clark v. Allen*, *supra*, insofar as they hold the contrary. Considerations of *stare decisis* should not stand in the way of rectifying two decisions that rest on such infirm foundations. Compare *Swift & Co., Inc. v. Wickham*, 382 U. S. 111, with *Kesler v. Department of Public Safety*, 369 U. S. 153. Properly construed, the 1923 treaty, which of course takes precedence over the Oregon statute under the

²¹ Treaty of Nov. 25, 1850, with Switzerland, 11 Stat. 587, 590.

²² See Diplomatic Correspondence of the United States, 1868, Pt. II, 194, 196-197; Foreign Relations of the United States, 1880, 952-953.

²³ See 4 Moore, Digest of International Law 6 (1906). The treaty was the Treaty of Dec. 18, 1832, with Russia, 8 Stat. 444, 448.

²⁴ *Bacardi Corp. v. Domenech*, 311 U. S. 150, 163, citing *Jordan v. Tashiro*, 278 U. S. 123, 127; *Nielsen v. Johnson*, 279 U. S. 47, 52.

Supremacy Clause, entitles the appellants in this case to succeed to the personal as well as the real property of the decedent despite the state statute.

IV.

Upon my view of this case, it would be unnecessary to reach the issue whether Oregon's statute governing inheritance by aliens amounts to an unconstitutional infringement upon the foreign relations power of the Federal Government. However, since this is the basis upon which the Court has chosen to rest its decision, I feel that I should indicate briefly why I believe the decision to be wrong on that score, too.

As noted earlier, the Oregon statute conditions an alien's right to inherit Oregon property upon the satisfaction of three conditions: (1) a reciprocal right of Americans to inherit property in the alien's country; (2) the right of Americans to receive payment in the United States from the estates of decedents dying in the alien's country; and (3) proof that the alien heirs of the Oregon decedent would receive the benefit, use, and control of their inheritance without confiscation. In *Clark v. Allen, supra*, the Court upheld the constitutionality of a California statute which similarly conditioned the right of aliens to inherit upon reciprocity but did not contain the other two restrictions. The Court in *Clark* dismissed as "farfetched" the contention that the statute, unconstitutionally infringed upon the federal foreign relations power. See 331 U. S., at 517. The Court noted that California had not violated any express command of the Constitution by entering into a treaty, agreement, or compact with foreign countries. It said that "What California has done will have some incidental or indirect effect in foreign countries, but that is true of many state laws which none would claim cross the forbidden line." *Ibid.*

It seems to me impossible to distinguish the present case from *Clark v. Allen* in this respect in any convincing way. To say that the additional conditions imposed by the Oregon statute amount to such distinctions would be to suggest that while a State may legitimately place inheritance by aliens on a reciprocity basis, it may not take measures to assure that reciprocity exists in practice and that the inheritance will actually be enjoyed by the person whom the testator intended to benefit. The years since the *Clark* decision have revealed some instances in which state court judges have delivered intemperate or ill-advised remarks about foreign governments in the course of applying such statutes, but nothing has occurred which could not readily have been foreseen at the time *Clark v. Allen* was decided.

Nor do I believe that this aspect of the *Clark v. Allen* decision should be overruled, as my Brother STEWART would have it. Prior decisions have established that in the absence of a conflicting federal policy or violation of the express mandates of the Constitution the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations.²⁵ Application of this rule to the case before us compels the conclusion that the Oregon statute is constitutional. Oregon has so legislated in the course of regulating the descent and distribution of estates of Oregon decedents, a matter traditionally within the power of a State. See p. —, *ante*. Apart from the 1923 treaty, which the Court finds it unnecessary to consider, there is no specific interest of the Federal Government which might be interfered with by this statute. The appellants concede that Oregon might deny inheritance rights to all nonresident

²⁵ See, e. g., *Clarke v. Deckenbach*, 274 U. S. 392; *Frick v. Webb*, 263 U. S. 326; *Webb v. O'Brien*, 263 U. S. 313; *Terrace v. Thompson*, 263 U. S. 197; *Heim v. McCall*, 239 U. S. 175.

aliens.²⁶ Assuming that this is so, the statutory exception permitting inheritance by aliens whose countries permit Americans to inherit would seem to be a measure wisely designed to avoid any offense to foreign governments and thus any conflict with general federal interests: a foreign government can hardly object to the denial of rights which it does not itself accord to the citizens of other countries.

The foregoing would seem to establish that the Oregon statute is not unconstitutional on its face. And in fact the Court seems to have found the statute unconstitutional only as applied. Its notion appears to be that application of the parts of the statute which require that reciprocity actually exist and that the alien heir actually be able to enjoy his inheritance will inevitably involve the state courts in evaluations of foreign laws and governmental policies, and that this is likely to result in offense to foreign governments. There are several defects in this rationale. The most glaring is that it is based almost entirely on speculation. My Brother DOUGLAS does cite a few unfortunate remarks made by state court judges in applying statutes resembling the one before us. However, the Court does not mention, nor does the record reveal, any instance in which such an occurrence has been the occasion for a diplomatic protest, or, indeed, has had any foreign relations consequence whatsoever.²⁷ The United States says in its brief as *amicus curiae* that it

"does not . . . contend that the operation of the Oregon escheat statute in the circumstances of this

²⁶ Brief for Appellants, p. 13. Thus, this case does not present the question whether a uniform denial of rights to nonresident aliens might be a denial of equal protection forbidden by the Fourteenth Amendment. Cf. *Blake v. McClung*, 172 U. S. 239, 260-261.

²⁷ The communication from the Bulgarian Government mentioned in the majority opinion at p. —, n. 7, *ante*, apparently refers not

case unduly interferes with the United States' conduct of foreign relations." ²⁸

At an earlier stage in this case, the Solicitor General told this Court:

"The Department of State has advised us . . . that State reciprocity laws, including that of Oregon, have had little effect on the foreign relations and policy of this country Appellants' apprehension of a deterioration in international relations, unsubstantiated by experience, does not constitute the kind of 'changed conditions' which might call for a re-examination of *Clark v. Allen*." ²⁹

Essentially, the Court's basis for decision appears to be that alien inheritance laws afford state court judges an opportunity to criticize in dictum the policies of foreign governments, and that these dicta may adversely affect our foreign relations. In addition to finding no evidence of adverse effect in the record, I believe this rationale to be untenable because logically it would apply to many other types of litigation which come before the state courts. It is true that, in addition to the many state court judges who have applied alien inheritance statutes with proper judicial decorum,³⁰ some judges have seized the opportunity to make derogatory remarks about foreign governments. However, judges have been known to utter dicta critical of foreign governmental policies even in purely domestic cases, so that the mere possibility of offensive utterances can hardly be the test.

to intemperate comments by state-court judges but to the very existence of state statutes which result in the denial of inheritance rights to Bulgarians.

²⁸ Brief for the United States as *Amicus Curiae*, p. 6, n. 5.

²⁹ Memorandum for the United States as *Amicus Curiae*, p. 5.

³⁰ See, e. g., *Estate of Larkin*, 52 Cal. Rptr. 441, 416 P. 2d 473.

If the flaw in the statute is said to be that it requires state courts to inquire into the administration of foreign law, I would suggest that that characteristic is shared by other legal rules which I cannot believe the Court wishes to invalidate. For example, the Uniform Foreign Money-Judgments Recognition Act provides that a foreign-country money judgment shall not be recognized if "it was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law."³¹ When there is a dispute as to the content of foreign law, the court is required under the common law to treat the question as one of fact and to consider any evidence presented as to the actual administration of the foreign legal system.³² And in the field of choice of law there is a nonstatutory rule that the tort law of a foreign country will not be applied if that country is shown to be "uncivilized."³³ Surely, all of these rules possess the same "defect" as the statute now before us. Yet I assume that the Court would not find them unconstitutional.

I therefore concur in the judgment of the Court upon the sole ground that the application of the Oregon statute in this case conflicts with the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany.

³¹ Uniform Foreign Money-Judgments Recognition Act § 4 (a)(1), 9B Unif. Laws Ann. 67.

³² See generally Schlesinger, *Comparative Law* 31-143 (2d ed. 1959).

³³ See *Slater v. Mexican Natl. R. Co.*, 194 U. S. 120, 129 (Holmes, J.); *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 355-356 (Holmes, J.); *Cuba R. Co. v. Crosby*, 222 U. S. 473, 478 (Holmes, J.); *Walton v. Arabian Am. Oil Co.*, 233 F. 2d 541, 545.



SUPREME COURT OF THE UNITED STATES

No. 21.—OCTOBER TERM, 1967.

Oswald Zschernig et al., Appellants, v. William J. Miller, Ad- ministrator, et al.	}	On Appeal From the Supreme Court of Oregon.
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[January 15, 1968.]

MR. JUSTICE WHITE, dissenting.

I would affirm the judgment below. Generally for the reasons stated by MR. JUSTICE HARLAN in Part IV of his separate opinion, I do not consider the Oregon statute to be an impermissible interference with foreign affairs. Nor am I persuaded that the Court's construction of the 1923 treaty in *Clark v. Allen*, 331 U. S. 503 (1947), and of similar treaty language in earlier cases should be overruled at this late date.